86-1944

No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are private physicians and other employees of a Medicare peer review organization operating under contract with the United States Department of Health and Human Services entitled to absolute immunity from claims of race discrimination and other constitutional violations as well as from common-law tort claims even though Congress, by statute, has extended only qualified immunity?

2. Are non-attorney federal officials entitled to absolute immunity from the constitutional tort and race discrimination claims of a physician excluded from Medicare reimbursement, where the exclusion is by a non-judicial administrative decision made without a hearing and in the absence of minimal due process?

3. Are Medicare peer reviewers and

federal Medicare administrators entitled to absolute immunity on policy grounds arising from the importance of the Medicare peer review scheme, without regard to the countervailing importance of eradicating racial discrimination?

Parties in the Court Below

1. The petitioners, Soung O. Kwoun, Henrickson Clinic, Inc., Henrickson Clinic Pharmacy, Inc., and Henrickson Clinic Laboratory, Inc., were plaintiffs below.

2. The following are respondents here and were defendants below: Southeast Missouri Professional Standards Review Organization; Missouri Statewide Professional Standards Review Council; Robert M. Kepner; Raymond A. Ritter; Sue Legaspi; James Armantrout; Larry Baker; William V. Booth; Jean A. Chapman; V. D. Delles; R. F. Dettmer; Gordon Eller; Jose H. Gonzales; T. O. Honaas; Robert C. Hoye; W. W. Hutton; Christopher Jung; G. H. Ladyman; John K. Legan; Gene H. Leroux; R. E. Marts; A. G. Miranda; Jesse Page; Pin Pu; Vinai Raksakulthai; Ben Till; A. T. Tuma; Austin Tinsley; Joseph Blanton; D. E. Edwards; Terry Guiley; Tom

Henderson; Berry B. White; Randall Huss; George McAnelly; Robert Robbins; Eugene Ruff; C. F. Sparger; Michael K. Blank; James Conant; A. N. Sandler; Allen Spitler; Kirby Turner; E. K. Buford; David Clark; Fuad H. Kandalaft; Earl Kennedy; Martha Reed; Clifford Talbert; Charles P. McGinty; W. E. Hendrickson; Robert E. Bregant; Katherine Rosenfeld; Frank Kram; Don Nicholson; Ralph A. Howard.

3. No review is sought here as to the following defendants in the courts below: General American Life Insurance Company; Tom Zorumski; Clifford A. Kinnunen; W. F. Montgomery; and Gary Clark.

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42 C.F.R. § 474.7 4
42 C.F.R. § 474.8 4
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Other Authorities:

Davis, K., Adequate Health Care and an Aging Society: Are they Morally Compatible? Winter Daedalus, 227 (1986) . . 16

Gregory, D., Immunity for Physicians in Peer-Review Committees, 11 Legal Aspects of Med. Practice No. 9, 1 (Sept. 1983) . 36

Keith, S., R. Bell, A. Swanson, A. Williams, Effects of Affirmative Action in Medical Schools: A Study of the Class of 1975, Vol. 313, No. 24, The New England Journal of Medicine 1519 (1985) 17

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SOUNG O. KWOUN, et al.,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Soung O. Kwoun,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1987.

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[1]Dr. Kwuon and the professional corporations through which he practices are plaintiffs-petitioners.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 811 F.2d 401 (8th Cir. 1987) and is set out in the separate Appendix to this petition at pp. 1a-55a. The orders of the court of appeals affirming the district court and denying rehearing are set out in the Appendix at pp. 145a- 148a. The opinions of the district court are reported at 622 F. Supp. 520 (E.D. Mo. 1985) and 632 F. Supp. 1091 (E.D. Mo. 1986) and are set out in the Appendix at pp. 76a-123a and 124a-139a, respectively. The decision of the district court denying plaintiffs' motion to alter or amend the judgment is unreported and is set out in the Appendix at pp. 140a-143a. An earlier decision of the district court in a related case, entitled Kwoun v. Schweiker, is reported at 528 F. Supp. 1004 (E.D. Mo. 1981) and is set out in the Appendix at pp. 56a-

75a.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of the case in its orders of March 27, 1986, and June 3, 1986, was entered on February 4, 1987. (A. 145a-146a) The court of appeals entered an order denying a timely petition for rehearing en banc, or, in the alternative, for rehearing by the panel, on March 9, 1987, and this petition for certiorari is filed within 90 days of that date. (A. 147a-148a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case involves a constitutional claim of denial of due process under the Fifth Amendment, and claims of racial discrimination and conspiracy under 42 U.S.C. § 1981 and § 1985(3), which are set out in relevant part in the Appendix

at pp.156a-157a.

Other statutes involved are the Medicare Peer Review Act, as amended, 42 U.S.C. § 1320c et seq., including: 42 U.S.C. § 1320c-16(b)(1977), now 42 U.S.C. § 1320c-6(1982), § 1320c-5, § 1320c-8, and § 1320c-9 which are set forth, in relevant part, in the Appendix at pp. 149a-156a.

Regulations involved are 42 C.F.R. §§ 474.3, 474.4, 474.7, 474.8, and 474.10, along with the PSRO Program Manual, all of which are set forth in relevant part in the Appendix at pp. 158a-167a.

STATEMENT OF THE CASE

The petitioner, Soung O. Kwoun, M.D., is a surgeon who was excluded from eligibility for Medicare reimbursement for services rendered to his patients by a ten year sanction decision of the Health Care Financing Administration

(H.C.F.A.) of the Department of Health and Human Services (HHS), in 1980.

The H.C.F.A. was acting on a recommendation based upon alleged quality of care issues issued by the Southeast Missouri Professional Standards Review Organization (the SEMO PSRO) which had been forwarded to the H.C.F.A. by the Missouri Statewide Professional Standards Review Council (the Statewide Council). The SEMO PSRO and the Statewide Council are non-volunteer peer review organizations operating under contract with HHS, pursuant to 42 U.S.C. § 1320c, et seq., which are incorporated as non-profit corporations under Missouri law, and which pay their participants in accordance with the directives of HHS.

Pursuant to statute and the implementing regulations, the sanction decision against Dr. Kwuon was imposed and a notice of his exclusion from

eligibility for Medicare reimbursement for quality of care reasons was published in newspapers in the area in which he practiced prior to a hearing.[2] He was required to take an administrative appeal in order to obtain a hearing before an adjudicative officer.

Dr. Kwoun appealed the sanction decision under 42 U.S.C. § 1320c-8(b). In 1983, after a hearing on the record before a federal Administrative Law Judge, Dr. Kwoun was restored to eligibility for Medicare reimbursement.[3]

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[2]42 U.S.C. § 1320c-9(b)(2); 42 C.F.R. § 474.10(e).

[3]As a result of information provided by the HCFA to the Missouri State Board of Registration For The Healing Arts and the Missouri Department of Social Services which administers state Medicaid payments, Dr. Kwoun was also threatened with exclusion from eligibility for Medicaid payments and with revocation of his medical license. Dr. Kwoun was cleared of the charges brought by the Board of Healing Arts on May 18, 1984, and of the charges made by the Department of Social Services in the attempt to

The Administrative Law Judge, in a lengthy opinion,[4] reversed the sanction decision of the HCFA and held that the HCFA had failed to establish any violation of any obligation or any professional neglect under the Medicare Act by Dr. Kwoun. (Court of Appeals Appendix, hereinafter "C.A. App.," 519.)

The ALJ found that the SEMO PSRO, the Statewide Council, and the HCFA had excluded Dr. Kwoun from eligibility without ever having developed Professional Standards of Health Care as required by 42 U.S.C. § 1320c-5(a) against which to compare Dr. Kwoun (C.A. App. 516-17, 520). The ALJ further found that the SEMO PSRO and the HCFA had

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exclude him from Medicaid payments on November 7, 1983, after two separate hearings before the Missouri Administrative Hearing Commission.

[4]The opinion is 183 pages, excluding exhibits, and was based on more than 2,100 pages of transcript.

totally failed to comply with the notice and opportunity to respond provisions of 42 C.F.R. Part 474, and that ". . . by reason of the Health Care Financing Administration's failure from the onset of the prosecution of this case to rectify the procedural errors of the SEMO PSRO by stating clearly the factual and legal issues, the respondent did not receive substantive due process in accordance with the Social Security Act and Regulations and the policy of the Department of Health and Human Services." (C.A. App. 506) The ALJ found that the medical records upon which the HCFA based its sanction decision had been rearranged, the sanction report had been tailored, and that at least one document purportedly found in a patient file had been contrived. (C.A. App. 528)

In strong language, the ALJ called the HCFA's pursuit of sanctions against

Dr. Kwoun "despicable" and conduct not worthy of professional people, and stated that there may have been some motive other than a concern over the quality of Dr. Kwoun's care of patients behind the sanction decision. (C. A. App. 513, 509) Indeed, at a non-due process administrative review before an HCFA official, one of Dr. Kwoun's witnesses testified under oath that he had heard a member of the SEMO PSRO publicly state that they wanted to get rid of "those damn Koreans" and that they just about "had Dr. Kwoun where they wanted him," and that then they were going to start on another Korean doctor in the area. (C.A. App. 305.) Although the original investigation was of the entire hospital at which Dr. Kwuon practiced, Dr. Kwuon was the only physician against whom sanctions were sought.

After the sanction decision was

reversed,[5] Dr. Kwoun brought suit against four employees of HCFA, in their individual capacities, fifty-one physicians and staff persons who were members and employees of the SEMO PSRO and of the Statewide Council, the SEMO PSRO and the Statewide Council themselves, and certain other defendants who are not respondents here.[6] The suit alleged claims of discrimination on account of race (Korean) in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3), due process violations under the Fifth

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[5]A prior injunction action, brought by Dr. Kwoun, Kwoun v. Schweiker, 528 F. Supp. 1004 (E.D. Mo. 1981), was dismissed without prejudice by the U.S. District Court, Eastern District of Missouri, for failure to exhaust administrative remedies, and was not appealed. A. 56a-75a.

[6]Petitioners do not seek review of the district court's dismissal of the General Life Insurance Company or of the court of appeals' decision with regard to the state employee defendants, Montgomery and Clark.

Amendment, and state law claims of malicious prosecution and intentional infliction of severe emotional distress, and other claims not relevant here. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and § 1343, and pendent jurisdiction. Damage allegations were based upon loss of income, damage to Dr. Kwoun's practice and reputation, and emotional distress.

In an order dated September 19, 1985, the district court denied the federal defendants' motion to dismiss on grounds of absolute immunity under Butz v. Economou, 438 U.S. 478 (1978) and official immunity under Barr v. Matteo, 360 U.S. 564 (1959). The federal defendants took an immediate appeal.[7]

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[7]Plaintiffs argued in the court of appeals that the denial of the federal defendants' motion to dismiss on grounds of official immunity under Barr was not an immediately appealable order under Mitchell v. Forsyth, 472 U.S. ___, 86 L.Ed.2d 411 (1985) and Nixon v.

The SEMO PSRO defendants' motions based on official immunity under Bushman v. Seiler, 755 F.2d 653 (8th Cir. 1985) and on other grounds were denied by the district court. A. 76a-123a.

However, on March 27, 1986, the district court sua sponte entered an order dismissing the entire case on the grounds that the peer review defendants were entitled to what was later described as "qualified immunity,"[8] a claim they had never raised. In so ruling, the court stated that it would "correct"

Fitzgerald, 457 U.S. 731 (1982). Although the court of appeals addressed the question of official immunity under Barr before it reached the question of absolute immunity under Butz, the court did not address the procedural and jurisdictional question of appealability anywhere in its opinion.

[8]In its March 27 order the district court did not describe the immunity it was granting as qualified, but discussed it in terms appropriate to a grant of absolute immunity. It was only in its later June 3 order that the district court used the term "qualified immunity."

Congress' failure to grant Medicare peer reviewers immunity. A. 124a-139a. In an order dated June 3, 1986, the district court held that its dismissal extended to all defendants, and that it intended to overrule its September 19, 1985 order with respect to the federal defendants.[9] A. 140a-143a. Dr. Kwoun appealed from the latter two orders of the district court to the Court of Appeals for the Eighth Circuit. The three appeals were consolidated for argument and decision.

The court of appeals held that all of the sixty-some defendants in the case,

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[9]The question of the procedural unfairness of a sua sponte dismissal of the case on grounds barring later litigation on the merits was presented to the court of appeals but was not addressed by that court even though the Eighth Circuit has consistently held that sua sponte grants of summary judgment are improper and require reversal. Williams v. City of St. Louis, 783 F.2d 114, 116 (8th Cir. 1986), Denton v. Mr. Swiss of Missouri, 564 F.2d 236, 242 (8th Cir. 1977), Twin City Federal Savings & Loan Association v. Transamerica Ins. Co., 491 F.2d 1122 (8th Cir. 1974).

including the peer review physicians, were entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978), and to the immunity of federal officials from common-law tort claims under Barr v. Matteo, 360 U.S. 564 (1959). Therefore, Dr. Kwuon's claims of racial discrimination and denial of due process must be dismissed in their entirety. At oral argument before the appeals court, government counsel had expressed the opinion that the peer review organizations could claim qualified but not absolute immunity. Since it held that all defendants were entitled to absolute immunity, the court of appeals did not reach the issue of the correctness of the district court's dismissal purportedly based on qualified immunity.

Judge Heaney, in a dissenting opinion, objected to the court of appeals

ordering the case dismissed. Instead, he urged, the court should have remanded for a determination by the district court of the functions performed by the federal defendants, as this Court did in Butz. He further urged that the peer review defendants were not entitled to absolute immunity in light of the clear language of 42 U.S.C. § 1320c-16 (1977), which expressly provides such persons with only good faith immunity. A. 43a-55a.

A petition for rehearing or for rehearing en banc was denied, thus occasioning this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

The present case raises significant questions concerning the scope of immunity to which state and federal officials responsible for carrying out portions of the Medicare program are entitled. At issue is not only the immunity doctrine as developed by decisions of this Court but also the intent of Congress when it enacted an immunity provision as part of the Medicare Act.

The Medicare program is nationwide in scope and is one of the primary means of providing low cost medical care to the poor and elderly.[10] Its administration depends to a significant degree on the

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[10] K. Davis, "Adequate Health Care and an Aging Society: Are they Morally Compatible?" Winter Daedalus, 227, 229-230 (1986).

states and on private physicians, both as providers of care and as regulators. For the minority poor, often the only source of medical care is minority physicians who are willing to establish practices in their communities.[11] Racial discrimination in the administration of the program can have a devastating effect, therefore, not only on the rights of minority physicians who are excluded as a result of prejudice but also on those persons for whose ultimate benefit the Medicare program is intended.

Physicians excluded from Medicare payments because of their race or ancestry not only suffer the immediate consequence of suspension from eligibility for reimbursement but suffer

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[11]S. Keith, R. Bell, A. Swanson, A. Williams, "Effects of Affirmative Action in Medical Schools: A Study of the Class of 1975." Vol. 313, No. 24, The New England Journal of Medicine 1519, 1524 (1985).

serious damage to their reputations and practices that restoration to eligibility is inadequate to correct. The only effective remedy for, and deterrent to, racial discrimination in this situation is the availability of damages against those who violate the civil and constitutional rights of physicians.

The importance of the issues presented here are not confined to the operation of the Medicare program. In recent years there have been dozens of reported decisions by both the federal appellate and district courts that have grappled with the issue of when and to what degree particular officials should be granted immunity from actions for damages. The results have been divergent, with courts granting absolute immunity to some officials,[12] and

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[12] E.g., Johnson v. Rhode Island Parole Bd. Members, 815 F.2d 5 (1st Cir. 1987); Sellars v. Procunier, 641 F.2d

qualified immunity to others.[13]

1295 (9th Cir. 1981) (parole board members); Tripati v. U.S.I.N.S., 784 F.2d 345 (10th Cir. 1986) (federal probation officer); Harper v. Jeffries, 808 F.2d 281 (3rd Cir. 1986) (parole board hearing officer absolutely immune; probation officer only entitled to qualified immunity); Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983) and Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (attorney disciplinary committees); Austin Municipal Securities Inc. v. Nat'l Ass'n of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985) (securities dealers' association).

[13] E.g., LeClair v. Saunders, 627 F.2d 606 (1980) (dairy farm inspector); England v. Rockefeller, 739 F.2d 140 (4th Cir. 1984) (governor not entitled to absolute legislative immunity); McSurley v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) (congressional staff member); Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986) (department of health inspectors); Bothke v. Fluor Engineers & Constructors, Inc., 713 F.2d 1405 (9th Cir. 1983), vacated on another ground, 468 U.S. 1201 (1984), order on remand, 739 F.2d 484 (9th Cir. 1984) (IRS official entitled only to qualified immunity); accord, Cameron v. IRS, 773 F.2d 126 (7th Cir. 1985); Tripati v. U.S.I.N.S., supra (immigration official entitled only to qualified immunity); Weiss v. Lehman, 642 F.2d 265 (9th Cir. 1981), vacated on other grounds, 454 U.S. 807 (1981) (Forest Service employee); Windsor v. The Tennessean, 719 F.2d 155, reh. denied, 726 F.2d 277 (6th Cir. 1983) (U.S. Attorney acting as employer only entitled

The decisions conflict both in terms of the results and the standards used. In the present case the court below decided as a matter of policy that certain types of officials should have absolute immunity without requiring a particularized showing of the functions performed by the officials. Other courts have followed the admonition of this Court in Nixon v. Fitzgerald, 457 U.S. 731 (1982) and have required a rigorous showing of need and function before extending absolute immunity.[14]

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to qualified immunity); Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986) (medical examiner).

[14]See, e.g., Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983); Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981), followed, Johnson v. Rhode Island Parole Bd. Members, 815 F.2d 5 (1st Cir. 1987). Bothke v. Fluor Engineers & Constructors, Inc., supra (under functional analysis, IRS official had only qualified immunity); Tripati v. U.S.I.N.S., supra (immigration official who reported alien to INS had qualified immunity, probation officers who prepared reports had absolute immunity); Harper v. Jeffries,

Petitioners urge that this case provides the opportunity for the Court to resolve a number of issues that have divided the lower courts and to provide guidance that will permit them to decide in particularized cases the degree of immunity to which an official should be entitled.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS REGARDING THE CIRCUMSTANCES UNDER WHICH ABSOLUTE IMMUNITY IS APPROPRIATE.

A. The Decision Below Conflicts With Decisions of This Court

The court below has misconstrued the scope of absolute immunity delineated in this Court's decisions in Imbler v. Pachtman, 424 U.S. 409 (1976), and Butz

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supra (parole board member has absolute immunity, probation officer only qualified immunity). See also McKinney v. Whitfield, 736 F.2d 766 (D.C. Cir. 1984) (functional analysis used to deny immunity to common-law torts to federal official acting outside the scope of authority). Contra Dretar v. Smith, 752 F.2d 1015 (5th Cir. 1985).

v. Economou, and has granted absolute immunity based upon points expressly left undecided by prior decisions of this Court.

The decision of the court of appeals takes the doctrine of prosecutorial and judicial immunity laid out in Imbler and extended in Butz, and expands it beyond all recognition, in holding that all of the participants in Medicare peer review, whatever their role, are entitled to the absolute immunity of prosecuting attorneys. The result is to completely bar a physician who claims that his wrongful exclusion from Medicare reimbursement was motivated by racial considerations from recovering for any part of his loss under common law, statutory, or constitutional theories.

In Imbler, this Court expressly left undecided the question whether a prosecutor performing investigative or

administrative tasks would be entitled to absolute immunity. In Butz, the Court held that federal hearing examiners or administrative law judges, agency attorneys arranging for the presentation of evidence on the record, and agency officials responsible for initiating or continuing a proceeding subject to agency adjudication were entitled to absolute immunity because their roles were analogous to those of judges and prosecuting attorneys. On the other hand, officials not performing such functions would be entitled to only qualified immunity, and that the actual functions performed would be determined by the district court on remand.[15]

The Court has denied absolute immunity to the Attorney General of the

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[15] On remand, Economou v. Butz, 466 F. Supp. 1351 (S.D.N.Y. 1979), the district court held that two of the defendants in Butz were not entitled to absolute immunity.

United States, Mitchell v. Forsyth, 472 U.S. ____, 86 L.Ed.2d 411 (1985), where the claim to absolute immunity was asserted based upon policy considerations. The Court has also indicated that the "public policy" to be considered in connection with claims for absolute immunity has to do with "the 'inherent' or 'structural' assumptions of our scheme of government," Nixon v. Fitzgerald, 457 U.S. 731, 748 n. 26 (1982), rather than with policy considerations per se.

In Cleavinger v. Saxner, 474 U.S. ___, 88 L.Ed.2d 507 (1985), this Court declined to grant members of a federal prison discipline committee absolute immunity, holding that the discipline committee's function was not a classic adjudicatory one. An important factor in the decision was the unavailability in the proceedings at issue of the

procedural safeguards present in Butz under the Administrative Procedure Act. 88 L.Ed.2d at 517.

In the present case, both the district court and the court of appeals determined that the peer review physicians and federal officials were entitled to immunity because of the importance of Medicare peer review to the Medicare system. The district court stated, "Immunity has consistently been provided for groups and individuals who by legal mandate, are charged with undertaking unpopular tasks," (A. 134a) relying on Malley v. Briggs, 475 U.S. ___, 89 L.Ed.2d 271 (1986).[16] The

[16]The district court, by relying on Malley, supra, apparently intended to grant the peer review defendants qualified immunity and to dismiss on that basis, although it did not so state. The court did not, in its March 27, 1986 order, apply the analysis set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982) or in Mitchell v. Forsyth, 472 U.S. __, 86 L.Ed.2d 411 (1985) to determine whether the defendants were alleged to

district court further stated that although Congress had "determined that comprehensive review of government funded health care is in the public interest," Congress had "not specifically provided immunity to encourage PSROs to vigorously pursue their appointed task," and "[t]he Court will correct Congress' oversight with its ruling today." (A. 138a-139a.)

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have violated rights which were clearly established at the time of the alleged conduct. However, in the district court's earlier order of September 19, 1985, the court had held that Dr. Kwoun's claim of entitlement to Medicare reimbursement, provided he complied with the conditions and requirements of the Medicare statutes, was within the type of property interests recognized in Board of Regents v. Roth, 408 U.S. 564, 577 (1972), that his claim of damage to his practice was recognized in Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957), and that other claimed deprivations had been recognized by the Eighth Circuit in Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980). Other courts have held that physicians have liberty and property interests in connection with Medicare reimbursement. Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2nd Cir. 1986); Case v. Weinberger, 523 F.2d 602 (2nd Cir. 1975).

The court of appeals granted absolute immunity to the peer review defendants, analogizing Medicare peer review to attorney disciplinary committees[17] and to the disciplinary committee of a securities dealers' association,[18] to which other circuits have granted absolute immunity. The court stated, "we are convinced that absolute immunity is 'essential for the conduct of the public business,' Butz, 438 U.S. at 507, . . . in this critical health care area." A. 362.

In affording the federal defendants absolute immunity, the court of appeals held that the federal officials' actions were at all relevant times prosecutorial

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[17] citing Clulow v. State of Oklahoma, 700 F.2d 1291, 1298 (10th Cir. 1983) and Simons v. Bellinger, 643 F.2d 774, 782 (D.C. Cir. 1980).

[18] citing Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985).

in nature. A. 21a. The court ignored the differences between the statutory scheme at issue in Butz under the Commodities Exchange Act and the Administrative Procedure Act, and in Austin, under the Securities and Exchange Act, where the initial action taken by the agency is a formal charge that is followed immediately by a judicial-type hearing on the record at which a charged party has the right to counsel and cross-examination, and the proceedings under the peer review statute here. The sanctioned provider is excluded from reimbursement by an administrative decision and a publication of the Medicare denial in a local newspaper long prior to any opportunity for an adjudicatory hearing. 42 U.S.C. § 1320c-9(b)(2), 42 C.F.R. § 474.10(e).

The court of appeals' logic would grant absolute immunity to any official,

regardless of his or her actual functions, if the action taken is eventually reviewed or subject to an adjudicatory hearing. Such a result is wholly at odds with the fundamental proposition that absolute immunity is the exception rather than the rule and is to be granted only to a narrow class of officials whose duties and functions particularly require immunization from the threat of suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U. S. at 506.

In sum, this case provides the Court the opportunity to resolve, for the guidance of the lower courts, two issues left undecided by Imbler and Butz: (1) what is the scope of the administrative and investigatory exception to absolute prosecutorial immunity; and (2) what are the limits of the policy considerations for granting absolute immunity that were

discussed in Butz? The issues in this case are presented in a context in which Congress has expressly provided that only limited immunity, of a hybrid variety, would be available to peer review participants. 42 U.S.C. § 1320c-16 (1977).[19] Although the case does not present the issue of a Congressional attempt to abrogate an already established application of immunity,[20] it does present issues concerning the limits of Imbler and Butz in the context of an explicit Congressional determination that public policy does not require absolute immunity.[21]

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[19]The present statutory section is 42 U.S.C. § 1320c-6(1982).

[20]See Nixon v. Fitzgerald, 456 U.S. at 748, n. 27.

[21]The legislative history of the Senate Committee on peer review appears at S. Rep. No. 1230, 92nd Cong. 2d Sess. 256-58 (1972) and with regard to PSRO liability states:

> The amendment provides

B. The Decision Below Conflicts With Decisions Of Other Circuits.

As can be seen from the text and cases cited above at nn. 12-14, other circuits have begun with the proposition that absolute immunity is the exception, not the norm. E.g., Windsor v. The Tennessean, 719 F.2d 155, 163-4 (6th Cir. 1983); Cameron v. I.R.S., 773 F.2d 126, 128 (7th Cir. 1985); Bothke v. Fluor Engineers and Constructors, Inc., 713 F.2d 1405 (9th Cir. 1983). Thus, other courts of appeals have engaged in a particularized analysis of the functions

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> protection from civil liability for those engaged in required review activities, or who provide information to PSROs in good faith, for actions taken in the proper performance of these duties. Activities taken with malice toward a practitioner or institution, or group of practitioners would not be considered action taken in the proper performance of these duties.

S. Rep., supra, at 266-67.

of each of the officials involved to determine whether absolute or qualified immunity was appropriate. See, e.g., Tripati v. U.S.I.N.S., 784 F.2d 345 (10th Cir. 1986); Harper v. Jeffries, 808 F.2d 281 (3rd Cir. 1986).

The court below, on the other hand, extended absolute immunity to every level and type of official involved in the peer review process because of policy considerations it derived from an overview of the statutory scheme involved. The absence of any functional analysis places the decision in square conflict with at least five other circuits.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS TO WHETHER PHYSICIANS ENGAGED IN MEDICARE PEER REVIEW ARE FEDERAL OFFICIALS AND WITH STATE COURTS AS TO THE SCOPE OF THEIR IMMUNITY FROM SUIT.

The court of appeals held that Medicare peer reviewers are federal

officials, ignoring both the clear Congressional intent that Medicare peer review be placed in the private sector,[22]

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[22]The legislative history of the Professional Standards Review statute is set forth in detail in Public Citizen Health Research Group v. Department of Health, Education, and Welfare, 668 F.2d 537, 542-43 (D.C. Cir. 1981). From its review of the legislative history the court concluded:

> We begin with the Report of the Senate Committee on Finance on the Social Security Amendments of 1972, S. Rep. No. 92-1230, 92d Cong., 2d Sess. (1972). It was the 1972 amendments which authorized the establishment of PSROs. Reading the Report, we are struck by the strong and recurrent theme, that the review process must be conducted by practicing physicians, not by the government or government employees. This theme is sounded over and over in the report.
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> * * * *
>
> We think these expressions demonstrate the fixed purpose of Congress that PSROs should be independent medical organizations operated by practicing physicians in the private sector, and not government agencies run by government employees. Government, said the committee, should not undertake to review the appropriateness and quality of

and the decisions of other circuits that are to the contrary. Public Citizen Health Research Group v. Department of Health, Education, and Welfare, 668 F.2d 537, 544 (D.C. Cir. 1981); U.S. v. University Hospital, 729 F.2d 144 (2nd Cir. 1984).

The court of appeals determined that the peer review defendants were federal officials in order to reach the further holding that they were therefore entitled

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medical services. A holding that the Foundation, an organization of private physicians, constitutes a government agency would be inconsistent with the congressional purpose.

See also Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125, 140 (N.D. Ill. 1975), affirmed without opinion, 423 U.S. 975 (1975).

HHS, in the PSRO Program Manual, states: "The Department of Health, Education, and Welfare recognizes that PSROs operate as independent, private, nonprofit corporations." P.S.R.O. Program Manual, Chapter XXIV, p. 1, June 20, 1978. See Appendix at 167a.

to official immunity from common law tort claims under Barr v. Matteo, 360 U.S. 564 (1959).[23] As the dissent below points out, however, (A. 51a-53a), a number of state courts have held that medical peer review committees, their members, and witnesses before them have only qualified immunity.[24]

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[23]The court of appeals considered the issue of official immunity from common law tort claims under Barr as to each group of defendants prior to considering the defendants' claims to absolute immunity under Butz v. Economou, thereby revealing considerable analytical confusion about the application of these immunity defenses; absolute immunity based upon prosecutorial or judicial functions would subsume the official immunity established in Barr.

[24]See, e.g., Franco v. District Court of Denver, 641 P.2d 922, 925 (Colo. 1982); (citing, Note, The Legal Liability of Medical Peer Review Participants For Revocation of Hospital Staff Privileges, 28 Drake L. Rev. 692 (1978-79); Note, Medical Peer Review Protection In the Health Care Industry, 52 Temple L.Q. 552 (1979)). Hayden v. Foryt, 407 So.2d 535, 536 (Miss. 1982), (granting review committee and witnesses before committee qualified immunity); Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025, 1028 (Fla. App. 1981) (granting hospital

The other circuits that have held that PSROs were not federal entities have thereby reached findings that they were not liable under the Freedom of Information Act. Public Citizen Health Research Group v. Department of Health, Education, and Welfare, supra; U.S. v. University Hospital. On the other hand, the Fifth Circuit in Smith v. North Louisiana Medical Review Association, 735

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staff and disciplinary body and its agents qualified immunity); Hackenthal v. Weissbein, 592 P.2d 1175, 154 Cal. Rptr. 423, 426-27, 24 C.3d 55 (1979) (granting qualified immunity to witnesses at hearing of peer review committee of nonpublic institution); Matviuw v. Johnson, 26 Ill. Dec. 794, 388 N.E.2d 795, 799, 70 Ill. App. 3d 481 1979) (granting witnesses at hearing of peer review committee qualified immunity), aff'd, 67 Ill. Dec. 370, 444 N.E.2d 606, 111 Ill. App. 3d 629 (1980); Southwick and Slee, Quality Assurance in Health Care, 5 J. Legal Med. 343, 386-96 (1984); D. Gregory, Immunity for Physicians in Peer-Review Committees, 11 Legal Aspects of Med. Practice No. 9, pp. 1, 2-4 (Sept. 1983); J. C. Norman, So-Called Physician "Whistle-Blowers" Protected: Immunity of Peer-Review Committee Members from Suit, 11 Legal Aspects of Med. Practice No. 2, pp. 4-7 (Feb. 1983).

F.2d 168 (5th Cir. 1984), held that PSROs were federal entities, thereby affirming the dismissal of an action under 42 U.S.C. § 1983. A similar result was reached in Taylor v. Flint Osteopathic Hospital, 561 Supp. 1152 (E.D. Mich. 1983), vacated and remanded for trial, 765 F.2d 146 (6th Cir. 1985), except that the plaintiff, a black physician alleging racial discrimination in a PSRO sanction decision, ultimately was found to be entitled to a trial on his 42 U.S.C. § 1981 claim. Thus, the result in Taylor is squarely in conflict with the result here. Cf. also, Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986), holding that a Korean physician who had been disqualified from hospital privileges could not bring an anti-trust action against a medical peer review committee because of the state action doctrine, but could maintain an

action under § 1981 for racial discrimination.

In short, the nature of PSROs, whether they are federal or private, has been interpreted virtually at will by the circuits, but in most cases in a manner which prevents the assertion of theories of recovery by persons who claim to be victims of the PSRO process. The variation in holdings as to the nature of PSROs, coupled with the near-uniformity in rulings against individual physicians seeking to challenge actions by PSROs, essentially leaves the medical community without the protection of any rational rule of law. The confusion in this area of law clearly requires resolution by this Court.

IV. THE DECISION BELOW RAISES IMPORTANT ISSUES RELATED TO THOSE PRESENTED BY A PENDING CASE, PATRICK V. BURGET.

Patrick v. Burget, 800 F.2d 1498 (9th Cir. 1986), pet. for cert. pending,

No. 86-1145, like the present case, concerns the scope of potential liability for medical peer reviewers who are alleged to have conducted peer review activities in bad faith. Patrick also raises the question of the limits to judicially-created doctrines of immunity where Congress has expressly indicated, by statute, its determination that public policy requires less than complete immunity for peer reviewers.

In Patrick the Ninth Circuit reversed a jury verdict finding the defendant physicians liable for conducting in-hospital peer review activities in a manner that violated federal anti-trust laws. The Ninth Circuit held that the peer review activities at issue in Patrick, which were authorized by an Oregon statute that required that medical facilities have procedures for reviewing staff privileges

and professional competence, were immune from antitrust liability by virtue of the state statute and state supervision of the process that the court found to exist.

The Ninth Circuit's decision in Patrick was the impetus behind passage of the Health Care Quality Improvement Act of 1986, Title IV, Public Law No. 99-660, which authorized peer review activities in private settings and provides for limited good faith immunity for participants,[25] and which also specifically provides that there is a cause of action remaining under 42 U.S.C. § 1981 against peer reviewers. The limited good faith immunity provided in the new law is substantially the same as that contained in the Medicare peer review law at issue here, 42

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[25]132 Cong. Rec. H9960 (daily ed. October 14, 1986) (statement of Rep. Edwards).

U.S.C. § 1320c-16,[26] and is also substantially the same as that provided in many state statutes.[27]

In the present case, the claims asserted were not antitrust, but rather were claims of racial discrimination, conspiracy, violation of constitutional rights, malicious prosecution and intentional infliction of severe emotional distress. If antitrust claims had been asserted, there could have been little basis for the assertion of state action immunity defense by the peer review defendants in view of the federal

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[26]Now 42 U.S.C. § 1320c-6.

[27]State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804, 806 n. 13 (Mo. en banc 1984) (Missouri Supreme Court recognized in dicta that peer reviewers would have only good faith immunity under Missouri Statute); Franco v. District Court of Denver, 641 P.2d 922 (Colo. 1982) (granting review committee and members qualified immunity); Buckner v. Lower Florida Keys Hospital District, 403 So.2d 1025, 1028 (Fla. App. 1981) (granting only good faith immunity).

statute authorizing the establishment of the SEMO PSRO. However, the absolute immunity granted by the Eighth Circuit in the present case, if carried to its logical conclusion, would bar civil damages actions arising out of private peer review as well as Medicare peer review, on whatever theory.[28] There is a potential for direct conflict between the Eighth Circuit, which may extend Kwoun to all medical peer review activities, and Patrick, should this Court find that the Ninth Circuit's decision in Patrick should be reversed, because in the Eighth

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[28]The decision in Patrick left open the possibility that state law theories such as malicious prosecution could be asserted on remand. Patrick, at 1509. The Seventh Circuit in Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986), held that a physician excluded from hospital staff privileges under the hospital's peer review process could not assert an anti-trust claim because of state action immunity, but remanded for trial on the physician's Title VII and 42 U.S.C. § 1981 claims based on race, Korean.

Circuit, even if an anti-trust theory lies, all possible defendants would have absolute immunity from suit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
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86 1944 (2.)
No. 86-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,

Respondents.

APPENDIX OF OPINIONS AND STATUTES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2379

Soung O. Kwoun, et al.,

Appellees,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellants.

No. 86-1502
No. 86-1838

Soung O. Kwoun, et al.,

Appellants,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellees.

Submitted: November 10, 1986
Filed: February 4, 1987

Appeals from the United States District Court for the Eastern District of Missouri

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Before HEANEY and BOWMAN, Circuit Judges, and ARNOLD,* District Judge.

ARNOLD, District Judge

The U.S. Department of Health and Human Services (HHS) oversees Medicare payments to doctors and hospitals. See 42 U.S.C. § 902, § 1395kk(a). As part of its oversight responsibilities, HHS is authorized to exclude doctors and hospitals from eligibility for Medicare payments if services have been provided that are substantially in excess of need or fail to meet professional standards. See 42 U.S.C. § 1395y(d)(1)(c). To determine whether to exclude doctors and hospitals

*/ The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas, sitting by designation.

from eligibility, HHS uses reports submitted by regional and statewide peer review organizations. See 42 U.S.C. § 1395y(g). The HHS office with the specific responsibility for making such determinations is called the Health Care Financing Administration (HCFA).

In December, 1978, HCFA notified the regional peer review group for southeastern Missouri[1] that the patient discharge rates in that region indicated the possibility of abuses in claims for Medicare payments. The regional peer review group began an investigation that eventually focused on the Poplar Bluff Hospital and the doctors with admitting privileges there. Soung Kwoun is one of those doc-

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[1] The regional peer review group is known as the Southeast Missouri Professional Standards Review Organization (SEMO).

tors.[2] Following the investigation, the regional peer review group recommended to the statewide peer review group[3] that the hospital change some of its procedures and that Dr. Kwoun be excluded from eligibility for Medicare payments for ten years. The statewide peer review group adopted the recommendation of the regional peer review group and then transmitted the report and recommendations to HCFA in March, 1980.

In September, 1980, HCFA notified Dr. Kwoun of the recommendation and advised him of his right to oppose it. After an informal hearing in December, 1980, and additional consideration of the

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[2] The other plaintiffs are corporate entities in which Dr. Kwoun has an interest.

[3] The statewide peer review group is known as the Missouri Statewide Professional Standards Review Council.

peer review group report and Dr. kwoun's responses to it, HCFA adopted the recommendation. In September, 1981, HCFA officially excluded Dr. Kwoun from eligibility for Medicare payments for a period of ten years. Dr. Kwoun then asked for a formal hearing before an administrative law judge. The administrative law judge reversed the exclusion, citing procedural and substantive errors by HCFA, especially the reliance of HCFA on informal discussions with members of the regional peer review group as the basis for excluding Dr. Kwoun. The administrative law judge then ordered Dr. Kwoun's reinstatement to eligibility for Medicare payments.

Dr. Kwoun subsequently brought this action against certain HCFA employees, members of the regional and statewide

peer review groups, two state officials involved in state proceedings brought against Dr. Kwoun as a result of the recommendation of the peer review group, and the insurance company that administers the Medicare payments program under contract with the government.[4] Dr. Kwoun claimed that the HCFA employees[5] deprived him of certain property and liberty interests without due process and subjected him to malicious prosecution and extreme and outrageous conduct. He asserted that the members of the regional

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[4] The insurance company was dismissed on grounds other than those involved in these appeals; its dismissal was not appealed.

[5] The HCFA employees are collectively referred to by the parties as the federal defendants.

and statewide peer review groups[6] and the state officials deprived him of equal rights under the law to make and enforce contracts and conspired to deprive him of the equal protection of the laws. His complaint against the peer review group members and the state officials also contained counts for malicious prosecution and extreme and outrageous conduct. Finally, Dr. Kwoun claimed that the state officials deprived him of certain property and liberty interests without due process.

The HCFA employees moved for summary judgment on the basis of absolute immunity. The district court denied the motion. Three of the HCFA employees ap-

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[6] The members of the regional and statewide peer review groups are collectively referred to by the parties as the SEMO defendants.

peal the denial of absolute immunity.[7] While the HCFA employees' appeal was pending, the district court dismissed, sua sponte, the case against all defendants on the ground of qualified immunity. The plaintiffs appeal these dismissals. We affirm the orders of dismissal of all defendants but do so on the ground of absolute rather than qualified immunity.

I.

We turn first to the federal defendants -- the HCFA employees. Defendant Frank Kram is the HCFA employee who reviewed the peer review group report and accepted its recommendation to exclude Dr. Kwoun from eligibility for Medicare reimbursement. Defendant Don Nicholson

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[7] A fourth HCFA employee was named as a defendant but did not appeal.

is the HCFA employee who signed the notice of proposed exclusion; defendant Ralph Howard is the HCFA employee who signed the final decision excluding Dr. Kwoun. Apparently the acts of defendant Kram are the primary focus of attention; the complaint is cryptic on this point, and the only specific allegation against defendants Nicholson and Howard in the plaintiffs' brief is that their conduct "was in a line with the earlier conduct of Kram ... and furthered and reinforced the previous lack of arms' length dealing."

While the regional peer review group was investigating Dr. Kwoun, but before it submitted its report to HCFA, defendant Kram apparently met with the members of the investigating committee in the offices of the statewide peer review

group and discussed the investigation of Dr. Kwoun. The administrative law judge found that the report of the peer review group did not meet the substantive due process requirements set forth in the applicable policy manual and federal regulations. He found in addition that Dr. Kwoun had been denied substantive due process because defendant Kram's adoption of the recommendation to exclude him from eligibility for Medicare payments was based at least in part on defendant Kram's discussions with members of the regional peer review group before the report was issued and not on the report itself.[8]

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[8] Because HCFA failed to follow certain procedural requirements relating to notice to Dr. Kwoun in December, 1979, of the proposed exclusion, the federal defendants are also charged with denying Dr. Kwoun procedural due process. These allegations are apparently included only

Barr v. Matteo, 360 U.S. 564, 575 (1959) (plurality opinion), grants absolute immunity from common-law tort claims to federal officials acting "within the outer perimeter of [their] line of duty." Our court has described absolute immunity from common-law torts as applying to acts connected "'... more or less ... with the general matters committed by law to the officer's control or supervision, and not ... manifestly or palpably beyond his authority.'" Bushman v. Seiler, 755 F.2d 653, 655 (8th Cir. 1985), quoting Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964), cert.

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as a basis for the constitutional claims against them. In addition, the federal defendants are charged with various misconduct during the hearing before the administrative law judge. These charges are also apparently included only as a basis for the constitutional claims against them.

denied, 380 U.S. 981 (1965). The plaintiffs contend that defendant Kram (and by extension defendants Nicholson and Howard, those officials having relied on defendant Kram's recommendation) acted outside the scope of his authority because defendant Kram was involved in discussions with members of the regional peer review group before its report was issued.

The first mention of HCFA in the regulations governing the imposition of exclusion sanctions under the Medicare program provides that a peer review group is to submit a report on violations to HCFA after an investigation of possible violations. See 42 C.F.R. § 474.3(b), § 474.8(a). Following submission of a peer review group report, HCFA is to determine whether a violation has occurred and is

to provide notice to the alleged violator of the proposed exclusion. See 42 C.F.R. § 474.10(a), § 474.10(c). There is no mention of HCFA involvement prior to the issuance of a peer review group report.

On the other hand, there is no explicit prohibition of such involvement either. Furthermore, HHS is charged with the duty of "promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services of the type for which [Medicare] payment may be made." See 42 U.S.C. § 1395y(g). HHS also has the authority to contract with peer review groups in order to carry out its duties. Id. All parties agree that it was HCFA that notified the regional peer review group of data indicating possible Medicare abuses. It seems apparent,

then, that any involvement of HCFA employees in a peer review group investigation after that notification would be within the scope of their authority.

Even if acceptance of the recommendation to exclude was based on improper factors (such as consideration of matters outside the peer review group report), that does not make the earlier actions of the HCFA employees outside the scope of their authority; it merely makes the acceptance of the recommendation incorrect. The federal defendants are therefore entitled to absolute immunity from common-law tort claims.

A more difficult question is how to categorize the purpose of the duties of the HCFA employees in the context of the process for imposing exclusion sanctions on possible violators of the rules gov-

erning Medicare payments.[9] The courts have recognized that the reasons for granting absolute immunity to federal officials from common-law tort claims -- to protect them "in the execution of their federal statutory duties from criminal or civil actions based on state law," Butz v. Economou, 438 U.S. 478, 489 (1978) -- do not apply to claims based on violations of constitutional law. Id. at 495.

In most cases, "federal executive officials exercising discretion are entitled only to ... qualified immunity"

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9 - The dissent would remand to the district court for a determination of which federal defendants' duties can be characterized as prosecutorial or adjudicative. Affidavits and exhibits already submitted by the federal defendants to the district court, however, establish that each one had the authority to "initiate or continue a proceeding subject to agency adjudication." Butz v. Economou, 438 U.S. 478, 516 (1978).

from constitutional claims. Id. at 507. Absolute immunity from constitutional claims is to be granted only in "those exceptional situations where it is demonstrated that [such] immunity is essential for the conduct of the public business." Id. The determination of when such exceptional situations exist is a "'functional'" one, Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982), and "[t]he burden of justifying absolute immunity rests on the official asserting the claim." Id. at 812.

"[J]udicial, prosecutorial, and legislative functions require absolute immunity," id. at 811, and therefore "agency officials performing certain functions analogous to those of a prose-

cutor"[10] are entitled to absolute immunity. Butz, 438 U.S. at 515. The Supreme Court has held only that in "initiating a prosecution and in presenting the [case against the defendant]"--those prosecutorial functions "intimately associated with the judicial phase" of his duties -- is a prosecutor entitled to absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). Whether a prosecutor acting as "an administrator or [an] investigative official rather than

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[10] "The decision to initiate administrative proceedings against an individual ... is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." Butz, 438 U.S. at 515. "[T]hose officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity ... for their parts in that decision." Id. at 516.

... an advocate" is entitled to absolute immunity is a question that the Court has expressly reserved. Id.

The federal defendants argue that the process of deciding whether to impose exclusion sanctions on a person under the Medicare program is analogous to an agency decision on whether to initiate administrative proceedings against a person in order to suspend or revoke his federal registration as a commodities futures merchant, see Butz, 438 U.S. at 481, or in order to impose professional disciplinary sanctions, see Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985). They therefore argue that actions taken prior to the formal hearing before the administrative law judge (defendant Kram's al-

legedly improper consultation with members of the regional peer review group in January, 1980, and the failure to give adequate notice to Dr. Kwoun in December, 1979, of the fact that he was being considered for exclusion sanctions) occurred in the context of essentially advocatory prosecutorial duties -- "deciding whether a proceeding should be brought and what sanctions should be sought," Butz, 438 U.S. at 515, against "a specific target," Gray v. Bell, 712 F.2d 490, 501 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

We agree. The statutes and regulations governing the exclusion sanctions process obviously anticipate the possibility of a formal adjudicative hearing before an administrative law judge designated by the appeals counsel of HHS.

See, 42 U.S.C. § 1395y(d)(3) and 42 C.F.R. § 474.10(g)(1), § 405.1533. The hearing is de novo, and HCFA has the burden of proof. Appeal of the decision of the administrative law judge is to the appeals counsel of HHS. See 42 C.F.R. § 405.1561. Judicial review of the appeals council decision is a possibility. See 42 U.S.C. § 1395y(d)(3).

The federal defendants further argue that their alleged misconduct during the formal hearing before the administrative law judge was clearly advocatory. We agree. An agency official's presentation of evidence in an agency hearing is protected for the same reasons that a prosecutor's presentation of evidence before a court is protected. Butz, 438 U.S. at 517.

Because the actions of the federal defendants at all relevant times were prosecutorial in nature, those defendants are entitled to absolute immunity from constitutional claims. The dismissal orders of the district court as to the federal defendants are therefore affirmed.

II.

The SEMO defendants include the regional peer review corporate body, the statewide peer review corporate body, the directors and officers of both groups, the regional peer review group representative to the statewide peer review group, the members of the regional peer review group investigation oversight committee, the Poplar Bluff Hospital review coordinator for the regional peer review group, the physician advisers to the

Poplar Bluff Hospital appointed by the regional peer review group, and the members of the regional peer review group investigating team specifically assigned to Dr. Kwoun.[11] These defendants argue that because they were participating in a review process established and governed by federal law, they are federal actors

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[11] The complaint does not specify whether the individual SEMO defendants are sued in their individual or their official capacity. However, our conclusions about the nature of the exclusion sanctions process and the role of peer review groups within that process make that question irrelevant. In addition, it turns out that some of the individual SEMO defendants either were not associated with the peer review groups at the relevant times, did not participate in the investigation of Dr. Kwoun, or participated only as expert witnesses in the formal hearing before the administrative law judge. Our conclusions about the nature of the exclusion sanctions process and the role of peer review groups within that process make it unnecessary for us to make separate rulings as to the different classes of SEMO defendants.

for the purpose of any analysis of their activities in relation to the investigation of Dr. Kwoun. We agree.

HHS is authorized to contract with peer review groups to carry out its duty to promote "the effective, efficient, and economical delivery of health care services, and [to promote] the quality of services of the type for which [Medicare] payment may be made." See 42 U.S.C. § 1395y(g). Medicare payments may not be made for items or services that are not "reasonable and necessary for the diagnosis or treatment of illness or injury." See 42 US.C. § 1395y(a)(1)(A). When a peer review group does undertake such a contract, the peer review group "must ... review some or all of the professional activities ... of physicians ... in the provision of health care services

and items for which [Medicare] payment may be made ... for the purpose of determining whether ... [those] services and items are ... reasonable and medically necessary and whether such services and items are not allowable under ... section 1395y." See 42 U.S.C. § 1320c-3(a)(1)(A). The peer review group is to determine, on the basis of its review, whether Medicare payments are to be made for the services reviewed. See 42 U.S.C. § 1320c-3(a)(2). The determination of the peer review group is conclusive as to Medicare payments unless it is changed by reconsideration of the peer review group.[12] See 42 U.S.C. §1320c-3(a)

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[12] Once HHS acts on the recommendation of the peer review group, a formal hearing before an administrative law judge is available for review of the action taken by HHS, with eventual judicial review also available. See 42 U.S.C. § 1395y(d)(3).

(2)(C). In other words, HHS essentially uses the peer review group as a consultant that recommends whether or not a doctor should continue to be eligible for Medicare reimbursements.

Consultants who investigate whether the services provided by doctors are necessary and eligible for Medicare reimbursement have been held to be "governmental agents for immunity purposes." Bushman v. Seiler, 755 F.2d 653, 655 (8th Cir. 1985)(defendant was consultant to insurance company that was Medicare carrier for HHS). See also Gross v. Sederstrom, 429 F.2d 96, 99 (8th Cir. 1970) (defendants were elected committee members who investigated farmer's eligibility for grain program for federal Agricultural Stabilization and Conservation Service; held to be federal officials for

immunity purposes in suit resulting from denial of farmer's application for participation). The SEMO defendants were therefore acting as federal officials for immunity purposes.

As federal officials for the purpose of an analysis of eligibility for immunity, the SEMO defendants are immune from common-law tort claims if their actions were not "'... manifestly or palpably beyond [their] authority.'" Bushman, 755 F.2d at 655, quoting Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965). The plaintiffs apparently concede that the actions of the SEMO defendants were within the authority given by the statute, since their argument concentrates on the assertion that the SEMO defendants are not federal officials. Furthermore, although

the administrative law judge found that the peer review group report was deficient and even inaccurate in several respects, he made no finding that the SEMO defendants had investigated Dr. Kwoun in any manner not authorized by statute or by their contract with HHS. We hold, therefore, that the SEMO defendants are absolutely immune from the common-law tort claims asserted against them.

The SEMO defendants argue that they are also entitled to immunity from constitutional claims because their actions were essentially prosecutorial in nature. They contend that the peer review groups are analogous to the professional organizations to whom absolute immunity from constitutional claims has been granted when disciplinary actions have resulted

in a lawsuit by the person disciplined. See e.g., Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985)(prosecutorial and adjudicative functions of securities dealers' association disciplinary committee); Clulow v. State of Oklahoma, 700 F.2d 1291, 1298 (10th Cir. 1983) (prosecutorial function of bar disciplinary committee); and Simons v. Bellinger, 643 F.2d 774, 782 (D.C. Cir. 1980)(prosecutorial and adjudicative functions of bar committee on unauthorized practice of law). We agree.

Peer review groups that are eligible to contract with HHS must be "composed of a substantial number of the licensed doctors of medicine and osteopathy engaged in the practice of medicine or surgery in

the area and who are representative of the practicing physicians in the area" and must be judged by HHS to be "able ... to perform reviews of the pattern of quality of care in an area of medical practice where actual performance is measured against objective criteria which define acceptable and adequate practice." See 42 U.S.C. § 1320c-1(1)(A), § 1320c-1(2). In conducting reviews under contract with HHS, the peer review groups are to "apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice within the [relevant] geographic area ... taking into consideration national norms where appropriate." See 42 U.S.C. § 1320c-3(6). The norms with respect to treatment for particular illnesses or health conditions are to include "the

types and extent of the health care services which ... are considered within the range of appropriate diagnosis and treatment of such illness[es] or health condition[s], consistent with professionally recognized and accepted patterns of care." See 42 U.S.C. § 1320c-3(a)(6)(A).

In other words, the medical peer review groups are organizations of professionals charged with the task of evaluating the performance of members of that profession. Thus, although medical peer review groups are not associations of professionals supervised by a licensing body, see e.g., Austin Municipal Securities, Inc., 757 F.2d at 680, and Clulow, 700 F.2d at 1297, they are nonetheless very similar to such associations. Furthermore, although medical peer review groups do not control a professional's

ability to practice in all contexts, see e.g., Simons, 643 F.2d at 781 (bar committee has power to disbar attorneys), they do control to some extent a professional's ability to practice in a particular class of cases -- those that involve claims for Medicare reimbursement. See 42 U.S.C. § 1320c-3(a)(2)(C), § 1395y(d)(3)(determination of peer review group on eligibility for Medicare reimbursement is conclusive unless changed by reconsideration of peer review group, formal hearing decision of administrative law judge, decision of appeals council of HHS, or judicial review). Thus medical peer review groups are very similar to bar committees that control whether a lawyer may practice before certain courts. See, e.g., Simons, 643 F.2d at 775.

Absolute immunity from even constitutional claims was granted to the securities dealers' association disciplinary committee in Austin Municipal Securities, Inc., 757 F.2d at 689, and to the bar disciplinary and practice committees in Clulow, 700 F.2d at 1298, and Simons, 643 F.2d at 782. Such immunity was granted because each committee's function shared the characteristics of the judicial process, because an unfavorable recommendation from each committee had the potential of provoking a retaliatory lawsuit, and because the subject of each committee's actions had adequate opportunity to challenge those actions through judicial review. See Austin Municipal Securities, Inc., 757 F.2d at 689, Clulow, 700 F.2d at 1298, and Simons, 643 F.d at 782, all incorpor-

ating the tests specified in Butz v. Economou, 438 U.S. 478, 513 and 515-16 (1978).

We find that the review activities of the medical peer review groups at issue here -- those entrusted to them by Congress so that the Medicare program can function effectively, efficiently, and economically, see 42 U.S.C. § 1395y(g)-- are similar enough to the review activities of the disciplinary and practice committees declared to be immune in the cases discussed above that similar protection should be extended.[13]

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[13] The dissent relies on a statutory provision, 42 U.S.C. § 1320c-6(b), in arguing that the SEMO defendants are entitled only to qualified immunity. Legislative history on this provision, in either its current or previous incarnation, is sparse. The legislative history for the entire peer review statute currently in effect refers to the intent of Congress to exempt peer review reports from coverage under the Freedom of

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Information Act. See H.R. Conf. Rep. 760, 97th Cong., 2d Sess. 443, reprinted in 1982 U.S Code Cong. and Admin. News 781, 1223. This exemption was probably a statement of agreement with the conclusions of the court in Public Citizen Health Research Group v. Department of Health, Education, and Welfare, 668 F.2d 537, 544 (D.C. Cir. 1981), that, for FOIA purposes, peer review groups were not intended to be, do not qualify as, and should not be considered to be government agencies. However, it also supports the conclusion that Congress, unaware that the courts would find some consultants advising government agencies to be federal actors for immunity purposes (as opposed to FOIA purposes), originally considered the members of peer review groups to be private parties and sought to protect them to come extent from civil liability. In order words, the statute was an effort to extend some protection to people who were thought to have none, rather than an attempt to restrict protection already acknowledged to exist. See e.g., S. Rep. 1431, 91st Cong., 2d Sess. 162 (1970)("The amendment provides protection from civil liability for those engaged in required review activities ...")(In reference to an early incarnation of the statute)(emphasis added). Once such consultants were considered federal actors for immunity purposes, of course, they became eligible for absolute immunity because of the prosecutorial or adjudicative function of their duties.

We are not unmindful of the problems that may arise from the extension to medical peer review groups of absolute immunity from both common-law tort claims and constitutional claims. We are convinced, however, that in order for the Medicare program to work effectively, efficiently, and economically, see 42 U.S.C. § 1395y(g), some controls on quality of care must be exercised. We are also convinced that the exercise of controls on quality of care greatly increases the benefits derived from the Medicare program by both the individual Medicare patients and our society as a

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The statutory provision is now superfluous for anyone except a consultant who would not be considered a federal actor for immunity purposes or one, classified as a federal actor for immunity purposes, whose duties would not be considered prosecutorial or adjudicative.

whole. We are further convinced that the only way to ensure both the effectiveness of the peer review system and the willingness of private doctors to participate in it is to insulate them from damage claims that may result from that work. The alternative to the use of private doctors to review medical decisions is the use of agency officials, who are much less likely to possess the expertise to evaluate such medical decisions. The use of agency officials to review medical decisions would almost certainly lead to a far less effective, efficient, and economical Medicare program. In short, we are convinced that absolute immunity is "essential for the conduct of the public business," Butz, 438 U.S. at 507, in this critical health care area. The availability of administrative and judi-

cial review serves as a check against abuse of the power inherent in the peer review system and against mistakes or sloppiness in that system. A further check over the long run is the power of HHS to terminate its contract with any peer review group.[14] See 42 U.S.C. § 1320c-2(c)(6).

We therefore hold that the SEMO defendants are absolutely immune from constitutional claims as well as common-law tort claims. The dismissal orders of the district court as to the SEMO defendants are affirmed.

III.

We turn last to the two state officials involved in state proceedings brought against Dr. Kwoun as a result of

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[14] Such a termination is not subject to judicial review. See 42 U.S.C. § 1320c-2(f).

the recommendation of the peer review groups. Defendant W. F. Montgomery is the deputy director for medical services of the Missouri Department of Social Services; defendant Gary Clark is the executive secretary of the Missouri State Board of Registration for the Healing Arts.

The Missouri Department of Social Services received a copy of the peer review group report that was submitted to HCFA. On the basis of that report, the Missouri Department of Social Services suspended Dr. Kwoun from eligibility for payments under the state Medicaid program. Defendant Montgomery was apparently the state officer who initiated the suspension.

The Missouri State Board of Registration for the Healing Arts -- the state

licensing body for doctors, see Mo. Ann. Stat. § 334.120 (Vernon 1987, which has the power to suspend or revoke a doctor's license, see Mo. Ann. Stat. § 334.100 (Vernon 1987) -- also received a copy of the peer review group report that was submitted to HCFA. On the basis of that report, the Missouri State Board of Registration for the Healing Arts initiated proceedings to suspend or revoke Dr. Kwoun's licence to practice medicine in Missouri. Defendant Clark, as the executive secretary of the board, was apparently the officer who initiated the proceedings for the board. He is considered an administrative officer (rather than a clerical employee). See Mo. Ann. Stat. § 334.123 (Vernon 1987) and Mo. Ann. Stat. § 620.010.15(4) (Vernon 1987).

Defendant Montgomery's suspension of Dr. Kwoun from eligibility for state Medicaid payments is clearly an act that was performed under the discretionary powers of his position; similarly, defendant Clark's act in initiating license suspension/revocation proceedings against Dr Kwoun is clearly an act that was performed under the discretionary powers of his position. Each is therefore immune under Missouri law from the common-law tort claims asserted against him. Kanagawa v. State by and through Freeman, 685 S.W.2d 831, 835 (Mo. 1985) (en banc).

This analysis of absolute immunity from constitutional claims for these state defendants is the same as that applicable to federal defendants. Butz v. Economou, 438 U.S. 478, 504 (1978). We therefore find that each is also

immune from the constitutional claims asserted against him.

The process of deciding whether to impose a state Medicaid exclusion sanction, the process of deciding whether to initiate a license suspension/revocation proceeding, and the process of deciding whether to impose a federal Medicare exclusion sanction are all of a kind. Each is essentially an advocatory prosecutorial function -- "deciding whether a proceeding should be brought and what sanctions should be sought," Butz, 438 U.S. at 515, against "a specific target," Gray v. Bell, 712 F.2d 490, 501 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Indeed, the administrative and judicial review available under Missouri law is similar to that available under federal law. See Mo. Ann. Stat. §

621.055.1 (Vernon 1987), Mo. Ann. Stat. § 536.100 (Vernon 1953)(review of exclusion from state Medicaid program); Mo. Ann. Stat. § 334.100.2 and § 334.100.3 (Vernon 1987), Mo. Ann. Stat. § 621.100, § 621.110, and § 621.145 (Vernon 1987), and Mo. Ann. Stat. § 536.100 (Vernon 1953)(review of suspension/revocation of license to practice medicine); and 42 U.S.C. § 2395y (d)(3)(review of exclusion from federal Medicare program).

The orders dismissing the state defendants, along with the orders dismissing the federal defendants and the SEMO defendants, are therefore affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. In my view, this Court should not blindly accord absolute immunity to all federal defendants for their alleged violations of Dr. Kwoun's constitutional rights and should not accord absolute immunity to any of the Southeast Missouri Professional Standards Review Organization (SEMO) defendants for their alleged violations of Dr. Kwoun's constitutional rights. I am otherwise in accord with the majority.

The Federal Defendants:

Absolute immunity should not be extended to all of the federal defendants for their alleged constitutional violations at this time because the record does not establish that all of them are necessarily entitled to it. The majority

correctly notes that entitlement to absolute immunity for constitutional violations is governed by Butz v. Economou, 438 U.S. 478 (1978), which holds that "agency officials performing certain functions analogous to those of a prosecutor" are entitled to absolute immunity. Id. at 515. What they neglected to point out is that the burden of establishing absolute immunity rests on those who claim it, see Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982); Butz, 438 U.S. at 506, and that the issue is one of fact to be decided in the first instance by the trial court. We should do as the Supreme Court of the United States did in Butz and remand the matter to the district court to determine which federal defendants, if any, were "responsible for the decision to initiate or continue a pro-

ceeding subject to agency adjudication" and to grant absolute immunity to those defendants and those only. Butz, 438 U.S. at 523, on remand, 466 F.Supp. 1351 (S.D. N.Y. 1979)(finding that all but two of the defendants were entitled to absolute immunity).

This Court is in no position to determine which federal officials are entitled to absolute immunity on the record before it. The district court has already held that the federal defendants are entitled to qualified immunity only. Thus, we can hardly rely on the court's earlier decision to support a claim for absolute immunity. The district court should be given an opportunity to review the full record and make appropriate findings. Dr. Kwoun is entitled to have an opportunity to submit any additional

evidence that may be relevant and to fully argue his position before the district court.

Lest it be argued that the district court's March 27, 1986, sua sponte order dismissing the complaint against all federal defendants is tantamount to granting absolute immunity, I would point out that the district court does not mention the federal defendants in that order. Moreover, the court discussed the federal defendants in its September 19, 1985, order and held that absolute immunity should not be extended to them under Butz. it is also important to note the district court specifically refused to dismiss Dr. Kwoun's claims under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3) stating the complaint clearly alleged Dr. Kwoun was denied participation in the

Medicare program because of his race.[1] This is a clear allegation of a constitutional violation that can only be avoided if the district court finds it meritless or specifically finds that each federal defendant is entitled to absolute immunity.

The SEMO Defendants:

Absolute immunity should not be extended to the SEMO defendants for a very simple reason. Congress specifically provided that participants in the

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[1] The record before us does not disclose whether the allegations of racial discrimination are purely conclusory in nature. SEMO's investigation initially focused on Poplar Bluff Hospital which reportedly had the highest readmission rate per 100 discharges of any hospital in its region. It was subsequently narrowed to four doctors, including Dr. Kwoun. As a result of the proceedings, however, neither the hospital nor the other three doctors were sanctioned. This action was reserved for Dr. Kwoun, apparently the only minority doctor in the hospital.

review process were entitled to qualified immunity only. At the time the events in this case took place, 42 U.S.C. § 1320c-6(b)(1), provided:

> (b)(1) No individual who, as a member or employee of any Professional Standards Review Organization or of any Statewide Professional Standards Review Council or who furnishes professional counsel or services to such organization or council, shall be held by reason of the performance by him of any duty, function, or activity authorized or required of Professional Standards Review Organizations or of Statewide Professional Standards Review Councils under this part, to have violated any criminal law, or to be civilly liable under any law, of the United States or of any State (or political subdivision thereof) provided he has exercised due care.
>
> (2) The provisions of paragraph (1) shall not apply with respect to any action taken by an individual if such individual, in taking such action, was motivated by malice toward any person affected by such action.

Id. (as amended October 25, 1977 (emphasis added).

The current statutory section, effective September 3, 1982, provides:

> (b) Employees and fiduciaries of organizations having contracts with Secretary
>
> No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization, shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any state (or political subdivision thereof) provided he has exercised due care.

42 U.S.C. § 1320c-6(b) (emphasis added).

It is clear that under either provision, qualified, not absolute, immunity is the standard to be applied to the SEMO defendants. In a case with facts nearly identical to the instant case, a black doctor brought suit against a Professional Standards Review Organization (PSRO), its staff, a hospital, and hospi-

tal officials, alleging discrimination in determining that many of the medical services performed by the doctor for his Medicare and Medicaid patients were unnecessary. With regard to the immunity of the PSRO and its staff, the court stated: "Defendant concedes, and both statutory provisions specify, that PSRO defendants are not immune from liability if they act with malice." Taylor v. Flint Osteopathic Hosp., Inc., 561 F. Supp. 1152, 1160 (E.D. Mich. 1983).[2] Thus, the

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[2] Neither party saw fit to appeal any aspect of Judge Boyle's decision in Taylor. Subsequent to her decision, however, Judge Boyle was appointed to the Michigan state bench and the case was reassigned to Senior Judge George E. Woods. The PSRO and PSRO officials (defendants) again moved for summary judgment, arguing that the doctor's section 1981 claims, remaining after their initial summary judgment motions, should be dismissed because the doctor had failed to establish disparate treatment at the hands of the defendants. Judge Woods granted the defendants'

statute is so clear that the Taylor defendants saw fit to concede and the court to expressly state that the PSRO and PSRO officials were entitled to qualified immunity only.

In this respect, the federal statute follows state statutes which have nearly uniformly codified the common law granting only qualified immunity to peer

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summary judgment motion. On appeal, the Sixth Circuit, in an unpublished opinion, reversed and vacated only Judge Woods' ruling and order, holding that, with respect to the section 1981 claim, issues of fact remained concerning the defendants' justifications for their actions. The Circuit Court thus remanded the case for trial on the merits. Taylor v. Flint Osteopathic Hosp., Inc., No. 84-1206 (6th Cir. May 28, 1985). Thus, Judge Boyle's finding that the PSRO and its officials are entitled to qualified immunity remains in effect and, in the final analysis, Dr. Taylor will receive exactly what Dr. Kwoun should receive -- a trial on the merits of his discrimination claim.

review committees.[3] The reasons for qualified immunity is clear:

> Peer review statutes, which state legislatures have enacted with increasing frequency in recent

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[3] See, e.g., Hayden v. Foryt, 407 So.2d 535, 536 (Miss. 1982), (granting review committee and witnesses before committee qualified immunity); Franco v. District Court of Denver, 641 P.2d 922, 925 (Colo. 1982)(granting review committee and committee members qualified immunity); Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025, 1028 (Fla. App. 1981)(granting hospital staff and disciplinary body and its agents qualified immunity); Hackenthal v. Weissbein, 154 Cal. Rptr. 423, 426-27 (1979)(granting qualified immunity to witnesses at hearing of peer review committee of nonpublic institution); Matviuw v. Johnson, 388 N.E.2d 795, 799 (Ill. App. 1979)(granting witnesses at hearing of peer review committee qualified immunity), aff'd, 444 N.E.2d 606 (1980); see also Southwick and Slee, Quality Assurance in Health Care, 5 J. Legal Med. 343, 386-96 (1984); D. Gregory, Immunity for Physicians in Peer-Review Committees, 11 Legal Aspects of Med. Practice No. 9, pp. 1, 2-4 (Sept. 1983); J. C. Norman, So-Called Physician "Whistle-Blowers" Protected: Immunity of Peer-Review Committee Members from Suit, 11 Legal Aspects of Med. Practice No. 2, pp. 4-7 (Feb. 1983).

> years, are directed toward the attainment of an elevated quality of health care at a reasonably low cost to the patient. Such legislation is based on the premise that the evaluation of the professional competency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. Peer review legislation promotes self-regulatory competence usually by protecting committee members with a qualified immunity and committee proceedings with some degree of confidentiality.

Franco v. District Court of Denver, 611 P.2d 922, 925 (Colo. 1982)(citing, Note, The Legal Liability of Medical Peer Review Participants For Revocation of Hospital Staff Privileges, 28 Drake L. Rev. 692 (1978-79); Note, Medical Peer Review Protection In the Health Care Industry, 52 Temple L.Q. 552 (1979)).

Yet, it does not follow from the importance of and need for candor in peer review proceedings that peer review committees and those testifying before them should be accorded an absolute privilege to testify or render decisions in a racially discriminatory manner. Such conduct, as has been alleged in this

case, advances no important interest of society or the professions and indeed actually hinders competent performance of the important tasks peer review committees are set up to perform. Thus, the conduct to which we may be affording an absolute privilege in this case and to which the majority's decision will most certainly afford an absolute privilege in future cases, has "no place in a forum convened to determine the qualifications of an individual to continue in the practice of his profession." Matviuw v. Johnson, 388 N.E.2d 795, 799 (Ill. App. (1979), aff'd, 444 N.E.2d 606 (Ill. 1980).

To summarize, I would remand this matter to the district court to determine which of the federal defendants performed a function analogous to that of a prose-

cutor, arranged for the presentation of the government's case in the course of the administrative proceeding, or performed adjudicatory functions. Only those defendants should be extended absolute immunity for the alleged unconstitutional acts directed at Dr. Kwoun. I would further direct the district court to extend only qualified immunity to the SEMO defendants for their alleged unconstitutional acts. If Congress wishes to extend absolute immunity to those who participate in the peer-review process in prosecutorial or adjudicative functions, it is free to do so. Until it does, I believe we are bound by the statute as written.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

==========
No. S81-123 C
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Soung O. Kwoun, M.D.

Plaintiff,

v.

Richard S. Schweiker, etc., et al.,

Defendants.

Filed December 23, 1981

MEMORANDUM

This case is now before this Court on the motion of the defendants to dismiss or in the alternative for summary judgment. Defendants bring this motion pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and contend that this Court lacks the requisite subject matter jurisdiction

because plaintiff failed to exhaust his administrative remedies. In addition, defendants assert that plaintiff's complaint fails to state a claim upon which relief may be granted because the procedures that the defendants afforded the plaintiff did not fail to comply with due process requirements.

Plaintiff's cause of action arises out of an initial determination by the Health Care Financing Administration (hereinafter HCFA)(which is a branch of the Department of Health and Human Services) to exclude the plaintiff from the medicare reimbursement program. The plaintiff was notified on September 11, 1981 that the agency was suspending his receipt of reimbursement under the Medicare Program pending any administrative appeals pursuant to 42 U.S.C. § 1320c.

Plaintiff is presently reimbursed in excess of $200,000.00 per year for his work at Henrickson Clinic. Upon suspension of his payments, the plaintiff petitioned this Court for a temporary restraining order, alleging that the agency had improperly excluded him from the Medicare Program by not affording him the procedural steps required by the statute and regulations. In response, a temporary restraining order was instituted on September 17, 1981. At this time, this Court believed that the plaintiff would suffer irreparable injury unless injunctive relief was granted and that defendants would not be adversely affected during the period in which the Order was in effect. However, after considering the claims of the plaintiff and defendants and the statutory scheme

it is this Court's conclusion that it lacks the requisite subject matter jurisdiction to consider plaintiff's claim, or to order any relief in this matter.

In order to understand the validity of the plaintiff's claims and the power of this Court to review those claims, it is necessary to examine the statutory scheme and the extent of review that the plaintiff already has received at the agency level. The defendants have charged the plaintiff with violating the sections of the Social Security Act, which requires a provider of medical services to give patients only those services that are medically necessary and also requires a doctor to meet professional standards. 42 U.S.C. § 1320c-9a(A)(B). In order to assure the en-

forcement of these statutory mandates, Congress established Professional Standard Review Organization (hereinafter PSRO), and charged it with the responsibility of determining whether doctors were complying with statutory requirements. 42 U.S.C. § 1320c-1(b)(1)(A). The PSRO is ordinarily composed of a number of local physicians. Congress purposefully provided that a PSRO should be operated by and comprised of physicians in the private sector; it was the intent of the legislature that the members of the PSRO would serve as governmental experts, who were familiar with local conditions and the quality of medical services that doctors rendered in their particular locality. Public Citizen Health Research Group v. Department of Health, Education, and Welfare, No.

79-2364 (D.C. Cir. Oct. 23, 1981). In the event that a PSRO determines that a doctor is providing unnecessary medical services or is not living up to professionally recognized standards, it is their duty to make a report and send that report with comments to the Statewide Professional Review Council. 42 U.S.C. §§ 1320c-11, c-6,c-9(b)(1). Prior to the transmission of this report the alleged violator is given notice of his failure to comply with statutory standards and an opportunity to respond to any accusations. The Review Council then sends a report to the HCFA, which reviews the information and gives the alleged violator notice of its decision and an opportunity to submit "documentary evidence and written argument concerning the proposed action" of the agency. 42

C.F.R. § 474.10(c). In the event that the HCFA determines, after a review of all the evidence, that the exclusion of the doctor from the Medicare Program is appropriate, the reimbursement of benefits will cease thirty days after the agency's decision. The statute and regulations further provide that a provider of health care only will become reeligible to receive benefits if the Secretary decides to reverse the decision of the HCFA, or if a court determines that the final decision of the Secretary is inappropriate. The Social Security Act allows for judicial review of the agency decision only after the Secretary has entered its final order. 42 U.S.C. § 405(g).

It is evident from the documents and exhibits submitted by both plaintiff and

defendants that plaintiff's activities were reviewed pursuant to the statutory scheme required by the Social Security Act. In April of 1979 the Southeast Missouri Foundation for Medical Care (SEMO), a Professional Standards Review Organization (PSRO) in southeast Missouri began to review Poplar Bluff Hospital because of its extremely high re-admission rate. As a result of monitoring the hospital, an in-depth review of Dr. Kwoun's and other doctors' admissions to Poplar Bluff Hospital was made. Due to Dr. Kwoun's alleged failure to cooperate and due to his standard of patient care in February of 1980 SEMO transmitted its report to the Missouri Statewide Professional Standards Review Council. This council then transmitted this report with its comment to the HCFA which recommended

a sanction be imposed. Dr. Kwoun was advised in writing in September of 1980 by the Central Office of HCFA of its intent to exclude his participation under the Social Security Reimbursement Program. The doctor was also notified of his opportunity to contest this determination by writing and personal appearance. On December 5, 1980, Dr. Kwoun took advantage of this opportunity and appeared at the administrative review before the director of HCFA. The evidence adduced at the trial was then submitted to SEMO for further review and recommendation. On September 2, 1981, HCFA advised Dr. Kwoun that he would be excluded from participation in the Medicare Program pursuant to 42 U.S.C. § 1395y(d)(1)(c) for a period of ten years. The letter also notified the doctor of

his right to a hearing before the ALJ. Accompanying the decision was a statement which details the basis for the decision to exclude the plaintiff. The letter states that among the grounds for exclusion are that the doctor failed to meet professionally recognized standards of health care. Specifically, the charges were that the doctor made inappropriate use of pacemakers, laboratory services, drug usage, scheduling of surgery, and use of ancillary services. Finally the agency accused Dr. Kwoun of rendering services inconsistent with the diagnosis of certain patients. Dr. Kwoun is presently appealing this decision in the manner prescribed by the statute.

Plaintiff is requesting this Court to invoke its mandamus jurisdiction pursuant to 28 U.S.C. § 1361 so as to

compel this federal agency to comply with the due process requirements of the Fifth Amendment of the Constitution. In addition, he requests injunctive relief so that he might continue to be reimbursed for his medical services. Plaintiff does not dispute the fact that the procedural steps as described were taken. However, plaintiff alleges that the agency failed to follow its own regulations in violation of the Fifth Amendment in the following manners: first, a report dealing with Poplar Bluff Hospital was converted into a report involving plaintiff and his medical practices; second, plaintiff alleges that he was not given sufficient opportunity to discuss the charges against them with the PSRO, in the letter sent to the doctor in September 1981, the agency alleges that the doctor refused to

meet with the PSRO; third, the Statewide Council and HCFA merely rubber stamped the report of the PSRO; finally, the letter of September 2, 1981 merely referred to a hearing before an ALJ, as opposed to stipulating that plaintiff had a right to review by the Appeals Council. Subsequent to the receipt of this letter plaintiff has appealed the decision of the HCFA, pursuant to the required statutory procedure. However, the plaintiff contends that the failure of the agency to follow its own regulations constitutes a violation of the due process clause of the Fifth Amendment and thereby entitles him to immediate judicial relief.

In response to plaintiff's claims that his constitutional rights were violated and he therefore is entitled to judicial relief, the defendants advance

two arguments. First, defendants contend that the plaintiff has failed to make the requisite showing for preliminary relief. Secondly, the government argues that this Court lacks the requisite subject matter jurisdiction to consider this cause of action pursuant to its mandamus jurisdiction.

Before granting injunctive relief it is the obligation of courts to balance the relative hardships and benefits to the plaintiff and defendant. In a recent case decided by a district court in the Eastern District of New York, the court held that a doctor suspended from the receipts of benefits pursuant to the Social Security Act, was not entitled to a preliminary injunction. Lemlich v. Schweicker, No. 81-2865 (E.D.N.Y. September 16, 1981). The court reasoned

that the potential harm to the public caused by a delay in the exclusion of a doctor who allegedly provided substandard medical care, from the Medicare Program, outweighed the potential harm to plaintiff's medical practice. In addition, the court reasoned that the plaintiff failed to establish a likelihood of success on the merits because he had not exhausted his administrative remedies. Finally, any harm that the plaintiff may suffer during suspension will be alleviated if the plaintiff ultimately prevails because he will receive compensation for those services that he has provided in the interim. However, if the agency and courts sustain the decision to exclude the plaintiff from the Medicare Program, recoupment of reimbursement payment is by no means certain. For

these reasons, further preliminary injunctive relief does not seem appropriate under the circumstances of this case.

The remaining issue for this Court to determine is whether this Court has the necessary jurisdiction to consider plaintiff's claim at this particular time. Section 405(g) of the Social Security Act provides for judicial review of challenges to agency determinations only after the Secretary renders his final decision on the merits.[1] In fact, the statute expressly precludes judicial review of the decision to exclude a

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[1] The statute provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

physician from the Medicare Program until "after such hearing as is provided in Section 405(g) of the Title". 42 U.S.C. § 1395y(d)(3).

The Supreme Court has held that the "final decision" requirement embodied in the Social Security Act is a statutorily specified jurisdictional prerequisite, and therefore is more than a codification of the judicially developed doctrine of exhaustion. Weinberger v. Salfi, 422 U.S. 749 (1975). However, there is an exception to the rule that requires the plaintiff to exhaust his administrative remedies prior to judicial review. In the event the party seeking judicial review establishes that the agency has violated his constitutional right, a court may intervene prior to the conclusion of the administrative processes.

Nevertheless, to fall within the exception to this rule, a party must present a constitutional claim which is collateral to the substantive claim, making adequate relief unobtainable at a post-termination hearing. Matthews v. Eldridge, 424 U.S. 319 (1975); Weinberger v. Salfi, 422 U.S. 749 (1975). In addition, the mere assertion of a constitutional claim is insufficient; the record must reflect a colorable claim. Kechijan v. Califano, 621 F.2d 1 (1st Cir.1980).

It is the opinion of this Court that plaintiff's cause of action does not fall within the exception to the exhaustion of administrative remedies rule. As stated, the requirement of a "final decision" by the Secretary, embodied in the statute, is central to the requisite grant of subject matter jurisdiction. Weinberger

v. Salfi, supra. Furthermore, it is clear that plaintiff's claim is not collateral to his substantive claim, and that the agency will be capable of correcting any procedural defects in a later evidentiary proceeding. The plaintiff is not questioning the constitutionality of the statute nor is he presenting an issue which is beyond the jurisdictional powers of the Secretary to determine.[2] The plaintiff is only claiming that the agency has failed to follow its own guidelines. Nor is it always the rule

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[2] In Lemlich v. Schweiker, supra, the district court reached the plaintiff's due process claim. However, the issue in that case was whether the constitution required a full evidentiary hearing prior to the suspension of benefits. The court held that a post-evidentiary hearing was adequate. Intervention in Lemlich was appropriate because further agency proceedings would not have resolved the constitutional issue before the court.

that an agency's violations of its own regulations always raise a constitutional question. United States v. Caceres, 440 U.S. 741 (1978); Morton v. Ruiz, 415 U.S. 199 (1971). Therefore this Court will not consider the merits of plaintiff's cause of action.

It is the opinion of this Court that intervention with agency procedures would be premature at this time. It would be inconsistent with the intent of Congress and the statutory scheme to preclude the agency from compiling an evidentiary record, which will allow for adequate judicial review, in the event that becomes necessary. It was evidently the intent of the legislature that this court should benefit from the expertise of the agency and the doctors asked to serve on PSRO.

Accordingly, defendants' motion for summary judgment will be granted, and defendants' motion to dismiss will be denied as moot because this Court has considered matters outside of the pleadings pursuant to Rule 56 of the Federal rules of Civil Procedure. In addition, the Order of this Court dated September 17, 1981, granting injunctive relief shall be vacated and this case shall be dismissed.

/s/
UNITED STATES DISTRICT JUDGE

Dated: December 23, 1981.

UNITED STATES DISTRICT COURT
E.D. MISSOURI
SOUTHEASTERN DIVISION

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No. S84-259C(D)

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Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

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Sept. 19, 1985

MEMORANDUM

WANGELIN, District Judge

This matter is before the Court upon six separate motions to dismiss the above-styled action or, in the alternative, for summary judgment. Said motions were brought by defendants Howard,

Nicholson, Kram, and Secretary of Health and Human Services; defendants Southeast Missouri Professional Standards Review Organization (SEMO PSRO) and named physicians (SEMO Doctors); defendant Legaspi and defendant Bregant. Each of the above named defendants incorporate Defendants' Suggestions in Support of Motions of defendant SEMO PSRO and others to dismiss or, in the alternative, for summary judgment filed with this Court January 18, 1985 as argument in support of their individual and collective motions.

FACTUAL BACKGROUND

Plaintiffs' cause of action arises out of an initial determination by the Health Care Financing Administration (hereinafter HCFA), which is a branch of the Department of Health and Human Services, to exclude the plaintiff from the

medicare reimbursement program. The plaintiff was notified on September 11, 1981 that the agency was suspending his receipt of reimbursement under the Medicare Program pending any administrative appeals pursuant to 42 U.S.C. § 1320c.

Plaintiff subsequently filed an action before Administrative Law Judge Francis J. Eyerman. The ALJ exonerated plaintiff Dr. Kwoun from all accusations against him. Plaintiffs filed this action alleging defendants' conduct in the above mentioned proceedings constituted violations of 42 U.S.C. § 1981 (Count I); 42 U.S.C. § 1985(2)(Count II); 42 U.S.C. § 1985(3)(Count III); and the Fifth Amendment (Count IV). Plaintiffs further assert tort claims for malicious prosecution (Count V); intentional infliction of emotional distress (Count VI); and

prima facie tort (Count VII).

In determining the sufficiency of a complaint in the face of a motion to dismiss for failure to state a claim pursuant to Federal Rule 12(b)(6), the accepted rule as articulated by the United States Supreme Court is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). If, on a motion to dismiss or a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as

provided in Rule 56. Fed. R. Civ. P. 12(c). Under Rule 56,

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Defendants appear to raise challenges under both Rule 12(b)(6) and Rule

56(c), and accordingly, to the extent that the Court will consider matters outside the pleadings on a given claim, the ruling shall be based on Rule 56(c).

A.

Defendants' first ground for dismissal is that the three corporate plaintiffs do not have a cause of action in that the complaint only alleged claims by plaintiff Kwoun not the three corporate plaintiffs. Defendants further assert that because the corporate plaintiffs are not members of a race, they cannot assert a cause of action under 42 U.S.C. §§ 1981 or 1985. Moreover, defendants assert that because no sanctions were brought against the corporate plaintiffs, they have no cause of action for denial of equal protection or due process or a claim for malicious prosecution.

Defendants' motion to dismiss for failure to state a cause of action as to three corporate plaintiffs must be denied. The complaint regarding these three plaintiffs is sufficient since it "... contains allegations from which an inference fairly may be drawn that evidence of material points will be introduced at trial." 5 Wright & Miller, Federal Practice & Procedure, § 1216 at 122-123 (1969). Moreover, corporations may file claims under 42 U.S.C. § 1981 as well as § 1985 and the United States Constitution. Des Vergners v. Seckonk Water District, 601 F.2d 9 (1st Cir. 1979). The relationship between plaintiff Kwoun and each of the corporate plaintiffs is articulated in the Amended Complaint. In each instance, plaintiff Kwoun is either the principal stockholder

or trustee of the plaintiff corporations and the plaintiff corporations are or have provided medical service. Given the possibility of alleged harm to plaintiff Kwoun, this Court finds that there is an inference that the plaintiff corporations in which plaintiff Kwoun was involved were also injured.

Thus, because the corporate plaintiffs may have been damaged by defendants' actions and because corporations are persons for purposes of civil rights and Fifth Amendment claims, the corporate plaintiffs do have a cause of action and defendants' motion to dismiss will be denied.

B.

Next, defendants assert that defendant SEMO doctors should be dismissed because defendant SEMO PSRO is a Missouri

not-for-profit corporation which can be sued in its corporate name and that the inclusion of defendants SEMO doctors is surplusage. This contention also fails.

Corporate officers and directors have personal liability under the federal civil rights acts if they intentionally cause a corporation to infringe on the rights secured by those acts. Tillman v. Wheaton-Haven Recreation Association, 517 F.2d 1141, 1146 (4th Cir. 1975). In Clark v. Universal Builders, Inc., 501 F.2d 324 (1974), the Seventh Circuit found that the concept of separate identify between shareholders, directors, and officers and their corporation is not sacrosanct. It demands even less respect if it becomes clear that the corporation is used as a shield to violate the civil rights of others. Id. at 340 n.23.

Plaintiffs' amended complaint alleges that defendant doctors through defendant SEMO PSRO have abridged plaintiffs' civil rights. As such plaintiffs' amended complaint is sufficient to state a cause of action against both defendant SEMO PSRO and defendant SEMO doctors.

C.

Defendants' next contention is that plaintiffs' claim under 42 U.S.C. §§ 1981, 1985(2), 1985(3), the Fifth Amendment, and their state claims are precluded by the Medicare Act. In support of this contention defendants cite Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

In Middlesex County Sewerage Authority the Court determined that when remedial devices provided in a particular

Act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under the civil rights acts. Id. at 20, 101 S.Ct. at 2626.

The scope of the preclusion provision has engendered much litigation and little consensus. It is agreed by all of the circuits that the central target of a Section 405(h) preclusion is "any action envisioning recovery of any claim emanating from" the Medicare Act. Association of American Medical Colleges v. Califano, 569 F.2d 101, 107 (D.C. Cir. 1977).

The holding in Middlesex County Sewerage Authority created a narrow exception to the Supreme Court's 1981 holding in Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) that 42 U.S.C. § 1983 authorizes a cause of

action for violations of federal statutory rights. The court in Middlesex was concerned that administrative procedures contained in particular statutes should not be circumvented. Middlesex, 453 U.S. at 20, 101 S.Ct. at 2626.

Defendants cite V.N.A. of Greater Tift City, Inc. v. Heckler, 711 F.2d 1020 (11th Cir. 1983) for the proposition of the Medicare Acts' exclusivity. While defendants correctly state the principle of V.N.A. of Greater Tift City, Inc., the facts here are distinguishable. In V.N.A. the plaintiffs' claims were seeking recovery on a claim directly related to provisions of the Act and the Court held that plaintiffs were limited to the provisions of the Act when seeking a remedy. Here, however, plaintiffs are alleging separate claims unrelated to the

Act. The only connection between the Act and plaintiffs' claims is that plaintiffs' claims arose during other proceedings under the Act. Plaintiff Kwoun has availed himself of the remedies available under the Act for his claims under the Act. Now plaintiffs are seeking redress for alleged wrongs which arose separate and apart from the Act. Accordingly, defendants' assertion that the Medicare Act precludes plaintiffs' action is unfounded.

D.

Next, defendants seek to dismiss all of plaintiffs' civil rights claims contending that plaintiff Kwoun's attempt to mitigate as reflected in Kwoun v. Schweiker, 528 F.Supp. 1004 (E.D. Mo. 1981) constitutes collateral estoppel.

The Eighth Circuit has continuously held that only a prior final judgment on the merits can have the effect of collateral estoppel. Oldham v. Pritchett, 599 F.2d 274, 276 n.1 (8th Cir. 1979); Poe v. John Deere Co., 695 F.2d 1103, 1105 (8th Cir. 1982). Further, a dismissal without prejudice operates to leave the parties as if no action had been brought at all. Moore v. St. Louis Music Supply, Inc., 539 F.2d 1191, 1194 (8th Cir. 1976).

In Kwoun v. Schweiker, the Court specificly states that it will not consider the merits of plaintiffs' cause of action. 528 F.Supp. 1004 at 1008. Judge Nangle left open the possibility of reaching the merits of plaintiffs' cause of action if the situation arose where such consideration was appropriate. Id. Thus Kwoun v. Schweiker was not a decision on the merits and defendants' claim of collateral estoppel is without merit.

E.

Defendants next contend that because they are members of a PSRO they are government officials and thus subject to a three year statute of limitations. Defendants rely on Smith v. North Louisiana Medical Review Assn., 735 F.2d 168 (5th Cir. 1984). In Smith, the Fifth Circuit found that a PSRO is a federal

entity because it is created by federal statute and performs a critical federal function of monitoring costs of services provided under the Medicare Act. Id. at 173.

However, an entity's status as a federal entity is controlled by Congress's intent in creating the organization. Recent cases have made it clear that any general definition of the term agency can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done. The unavoidable fact is that each new arrangement must be examined anew and in its own context. Public Citizen Health v. Dept.Health, Ed., Etc., 668 F.2d 537, 542 (D.C. Cir. 1981).

The Report of the Senate Committee on Finance on the Social Security Amendments of 1972, S.Rep. No. 92-1230, 92 Cong., 2nd Sess. (1972) provides a clear summary of Congress's intent as to the status PSRO's should have with respect to government versus private agency.

The committee believes that the review process should be based upon the premise that only physicians are, in general, qualified to judge whether services ordered by other physicians are necessary. The committee is aware of increasing instances of criticism directed at the use of insurance company personnel and government employees in reviewing the medical necessity of services. S.Rep. supra at 256.

The committee has therefore included an amendment, as it did in H.R. 17550,

which authorizes the establishment of independent professional standards review organizations by means of which practicing physicians would assume responsibility for reviewing the appropriateness and quality of the services provided under medicare and medicaid.

The committee's bill provides specifically for the establishment of independent professional standards review organizations formed by organizations representing substantial numbers of practicing physicians in local areas to assume responsibility for the review of service (but not payments) provided through the medicare and medicaid programs. Id. at 257.

It is preferable and appropriate that organizations of professionals undertake review of members of their

profession rather than for government to assume that role. The inquiry of the committee into medicare and medicaid indicates that government is ill equipped to assume adequate utilization review. Indeed, in the committee's opinion, government should not have to review medical determinations unless the medical profession evidences an unwillingness to properly assume the task. Id. at 258.

Priority in designation as a PSRO would be given to organizations established at local levels representing substantial numbers of practicing physicians who are willing and believed capable of progressively assuming responsibility for overall continuing review of institutional and outpatient care and services. Local sponsorship and operation should help engender confidence in the familiar-

ity of the review group with norms of medical practice in the area as well as in their knowledge of available health care resources and facilities. Participation in a PSRO would be voluntary and open to every physician in the area. Id. at 259.

PSRO physicians engaged in the review of the medical necessity for hospital care and justification of need for continued hospital care must be active hospital staff members. The purpose here is to assure that only doctors knowledgeable in the provision and practice of hospital care will review such care. Id. at 260.

It is expected that a PSRO would operate in a manner which conserves and maximizes the productivity of physician review time without unduly imposing on

his principal function, the provision of health care services to his own patients. Id. at 264.

Employees of PSRO would be selected by the organization and would not be government employees. Id. at 266.

This Court finds that these expressions demonstrate the fixed purpose of Congress that PSRO's should be independent medical organizations operated by practicing physicians in the private sector, and not government agencies run by government employees. Public Citizen Health v. Dept. of Health Fed. etc., 668 F.2d 537, 543 (D.C. Cir. 1981). A finding that defendant SEMO PSRO and defendant SEMO doctors make up a governmental agency would be inconsistent with the Congressional purpose.

As such, plaintiffs' claim provides a sound basis for applying the five year statute of limitations contained in MoRS § 516.120. Moreover, the Eighth Circuit has determined that the five year statute of limitations is applicable for actions brought under 42 U.S.C. § 1981. See Drake v. Southwestern Bell Telephone Co., 553 F.2d 1185 (8th Cir. 1977).

> The five-year Missouri statute, § 516-120 Mo. Ann. Stat., however, is applicable because a proceeding under § 1981 represents an action upon a liability implied, subd. 1; or an "action upon a liability created by a statute," subd. 2; or an action for "injury to the person or rights of another, not arising on contract and not herein otherwise enumerated," subd. 4. This Court need not decide which of these subdivisions covers this statutory action but the cases indicate that a § 1981 action properly fits the description of one or more subdivisions of § 516.120.

Id. at 1188.

Additionally, plaintiffs alleged that the complained of actions constitute a continuing course of conduct and did not accrue at a specific isolated date. If plaintiffs' allegations are found to be true, no statute of limitation began to run until the date of the hearing before ALJ Eyerman. As such there is sufficient recent conduct to sustain a cause of action in this matter and defendants' motion to dismiss based upon the statute of limitations will be denied.

F.

Defendants Kram, Nicholson, and Howard assert sovereign immunity and seek to dismiss all claims against them. Defendants contend that they are entitled to absolute immunity because plaintiffs' claims arise from the initiation of

administrative actions of a prosecutorial nature.

The Supreme Court has issued a clear description of the immunities available to federal officials in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Without retracing the Supreme Court's steps, it is abundantly clear that federal officials cannot claim immunity if their actions are manifestly beyond their line of duty. Butz, supra at 484-85, 98 S.Ct. at 2899-2900.

In the present case, plaintiffs allege misconduct seemingly beyond the scope of defendants' duty and authority. Plaintiffs cite the ALJ's finding that "the HCFA employees were involved in defendant SEMO PSRO's Sanction Report long before it was any of their business, even before it was issued by defendant

SEMO PSRO and defendant SEMO doctors." This Court finds that reasonable minds could differ as to whether such activity is within defendants' scope of authority. Accordingly, defendants Kram, Nicholson, and Howard will not be dismissed based upon an absolute immunity theory.

G.

Defendants next seek to dismiss plaintiffs' claims under 42 U.S.C. § 1981 contending that plaintiffs have failed to plead a denial of any right protected by the act and have failed to plead detailed factual allegations showing the defendants' actions were racially motivated.

In a civil rights action, pleadings are to be liberally construed. Only when the plaintiff can prove no set of facts that would entitle him to relief is a District Court warranted in granting a

motion to dismiss. Windsor v. Bethesda General Hospital, 523 F.2d 891, 893 (8th Cir. 1975).

Plaintiffs' complaint contends that plaintiff was denied participation in the Medicare program, subjected to abuses in connection with the sanction process and essentially deprived of income because of his race. Among the rights protected by 42 U.S.C. § 1981 are the right to earn a living without regard to one's race, to make contracts for education, to fair use and access to justice, and to participate in public benefits programs. See Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Johnson v Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976);

Martinez v. Fox Valley Bus Lines, 17 F.Supp. 576 (N.D. Ill. 1936); Pennsylvania v. Local 542, 347 F.Supp. 268 (E.D. Penn. 1972).

In Taylor v. Flint Osteopathic Hospital, Inc., 561 F.Supp. 1152 (E.D. Mich. 1983) the Court denied defendant's motion to dismiss saying:

> ... Plaintiff's complaint appears to state a claim under § 1981 against the PSRO in as much as it alleges, in essence, that the PSRO acted in a discriminatory manner in performing its peer review functions and that PSRO's discriminatory conduct precluded plaintiff from performing his "contracts" with his patients and, ultimately, with FOH.
>
> The PSRO's sole direct challenge to the § 1981 claim is that it is devoid of specific factual allegations that PSRO's treatment of plaintiff differed from their treatment of similarly situated white persons, as required by § 1981. This Court having concluded, however, that the complaint fairly apprises the PSRO of the elements of plaintiffs' claim under § 1981, the motion to dismiss this claim pursuant to F.R.Civ. P. 12(b)(6) is hereby denied.

Id. at 1159-60.

Defendants in this case are in no better position than defendant in Taylor. Plaintiffs have alleged actions taken which if true have deprived plaintiffs of rights protected by 42 U.S.C. § 1981. Further, plaintiff has alleged that the actions were motivated by plaintiff's race. Accordingly, this court finds that plaintiff has stated a cause of action under 42 U.S.C. § 1981.

H.

Defendants next move to dismiss Count II of plaintiffs' complaint alleging a violation of 42 U.S.C. § 1985(2). Section 1985(2) relates to institutions and processes of federal judicial proceedings and conspiracies to obstruct the course of justice in state courts. Kush v. Rutledge, 460 U.S. 719,

103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). Moreover, § 1985(2) expressly requires force, intimidation, or threat against persons holding public office, witnesses, or jurors. Williams v. St. Joseph Hospital, 629 F.2d 448, 451 (7th Cir. 1980).

There are no allegations regarding either federal courts or state courts in plaintiffs' complaint or amended complaint. Further, plaintiffs have not alleged that defendants ever subjected any person to any force, intimidation or threat. Accordingly, this Court will grant defendants' motion to dismiss Count II of plaintiffs' amended complaint.

I.

Defendants further contend that plaintiffs have failed to state a cause of action under 42 U.S.C. § 1985(3) claiming the amended complaint (1) fails

to adequately allege the existence of a conspiracy, (2) fails to allege an invidiously discriminatory animus, and (3) fails to allege the deprivation of a constitutional right protected by § 1985(3).

Under Fed. R. Civ. P. 8, technical niceties of pleading are not required. Rather a short and plain summary of the facts sufficient to give fair notice of the claim asserted is sufficient. Means v. Wilson, 522 F.2d 833, 840 (8th Cir. 1975). In addition, a complaint under 42 U.S.C. § 1985(3) must allege facts to show that intentional or invidious discrimination was the object of the conspiracy. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

In Means v. Wilson, the complaint alleged that the defendant conspired with "private individuals" and two other named individuals to ensure defendant was re-elected. Means v. Wilson, 522 F.2d at 840-41. Upon no more than the above, the Eighth Circuit found that the plaintiff had stated a cause of action under 42 U.S.C. § 1985(3). Id.

In the present case, plaintiffs have alleged that the named defendants "acted individually, together, and with others. ..." Such allegations fairly raises the inference of conspiracy. Following the precedent of Means, supra, the Court finds that plaintiffs' amended complaint, although inartfully drafted, does allege conspiracy sufficiently to state a claim under 42 U.S.C. § 1985(3).

Defendants' contention that the complaint fails to allege a class based animus is also without merit. The amended complaint alleges that plaintiff Kwoun is an Asian-American and that defendants subjected him to treatment different than that reserved for white persons. The amended complaint then enumerates all of plaintiffs' charges of how he was treated. This Court finds the pleadings sufficient to allege a class based animus and thus support a § 1985(3) cause of action.

Defendants' contention that plaintiffs' § 1985(3) claim must fail because it lacks a constitutional predicate is also without merit. Case law supports plaintiffs' contention that 42 U.S.C. § 1981 provides a substantive basis for redress under § 1985(3). In Witten v.

A.H. Smith and Co., 567 F.Supp. 1063 (D.Md. 1983), Judge Miller examined the language of the statute, the general legislative history with regard to the rights for which a remedy is provided by § 1985(3), and the intent of the Forty Second Congress. Judge Miller concluded that 42 U.S.C. § 1981 is a proper substantive basis for a claim of redress under § 1985(3). Id. at 1072. This same position was taken in Miller v. St. Louis Theatrical Co., No. 83-2305C(1)(E.D. Mo. August 1, 1984).

As discussed supra, this Court has determined that plaintiffs have raised a colorable claim under 42 U.S.C. § 1981. Accordingly, defendants' motion to dismiss plaintiffs' § 1985(3) claim will be denied.

J.

Defendants seek to dismiss plaintiffs' Count IV. Plaintiffs agree that defendant SEMO PSRO and defendant SEMO doctors are not federal officials subject to a claim under the Fifth Amendment. Accordingly, plaintiffs' Count IV will be dismissed with respect to defendant SEMO PSRO and defendant SEMO doctors.

Defendants Kram, Nicholson, and Howard challenge plaintiffs' constitutional claims contending that there is no private right of action under the Fifth Amendment because plaintiff Kwoun had an alternate remedy via the administrative review process and that plaintiff has not alleged the deprivation of a constitutionally protected property interest without due process.

The Supreme Court has held that victims of a constitutional violation by a federal officer have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 19 L.Ed.2d 619 (1971). Additionally, plaintiffs are not limited to statutorily created causes of action to the exclusion of a Bivens action if the alternative remedy is not equally effective and intended to operate as a substitute for the action under Bivens. Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

The "Medicare Act" provides only for reimbursement in connection with care services provided without compensation. It does not provide compensation for

plaintiffs' alleged loss of reputation, emotional distress, lost business, punitive damages, nor an opportunity to be heard before a jury. All of the aforementioned differences between the Medicare Act remedy and a Bivens action are significant and counsel in favor of allowing plaintiffs' claim in Count IV against defendants Kram, Nicholson, and Howard. Carlson v. Green, supra.

Further, plaintiffs have alleged the deprivation of constitutionally protected rights without the benefit of due process.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a

> purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement of those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Here plaintiff asserts a property interest in his continued participation in the Medicare Program and to receive reimbursement for his services. Physicians such as plaintiff Kwoun are entitled to participation in the Medicare Program provided they comply with certain conditions and requirements under 42 U.S.C. §§ 1320 and 1395. This Court finds that these conditions and require-

ments are sufficient to secure benefits and to support claims of entitlement to those benefits under the rule in Board of Regents v. Roth, supra.

Plaintiff also alleges deprivation of his interest in his profession and a right to earn a living. These interests have long been recognized as property interests which are protected by due process. Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 755, 1 L.Ed.2d 796 (1957).

Plaintiff also has alleged that he was denied fair access to the procedures normally provided to physicians under the Medicare Act. The Eighth Circuit has previously determined that if a plaintiff can prove defendant interfered with his right to procedural due process, he is entitled to damages that actually re-

sulted, which would include, for example, mental and emotional distress. Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980). Accordingly, this Court finds that plaintiff Kwoun's amended complaint alleges deprivation of the types of property and liberty interests which are necessary to state a claim under the Fifth Amendment.

K.

Defendants seek to dismiss plaintiffs' claim of malicious prosecution contending that neither defendant SEMO PSRO or defendant SEMO doctors commenced a prosecution against defendant Kwoun:

> "The elements of a cause for malicious prosecution are: (1) commencement of prosecution of the proceedings against the present plaintiff; (2) its legal causation by the present defendant; (3) its termination in favor of the present plaintiff; (4) absence of probable cause for such proceedings; (5) the presence of malice therein; (6) damage to

plaintiff by reason thereof."

Palermo v. Cottom, 525 S.W.2d 758, 763 (Mo. App. 1975). Of these six factors defendants complain of only the first:

> A person's acts may be the legal cause of prosecution if instituted at his insistence and request. It is sufficient if his action takes the form of an affidavit on which the case is based, regardless of further participation in the prosecution.... To impose liability there must be affirmative action by way of advice, encouragement, pressure or something similar in the institution, or causing the institution of the prosecution.

Id.

In this case plaintiff has alleged that defendants prepared fraudulent reports and recommended that plaintiff be permanently excluded from participation in Medicare and related programs. Plaintiff further alleges that defendants' recommendations and reports precipitated the institution of the action complained

of. Such allegations are sufficient to survive a motion to dismiss for failure to state a cause of action for which relief can be granted.

L.

Defendants also seek to dismiss plaintiffs' claim for outrageous conduct contending that the conduct alleged in the complaint is not extreme and outrageous as a matter of law.

The Missouri Supreme Court "has accepted the Restatement's view that a right of action does exist for damages for severe emotional distress, intentionally and recklessly caused, by 'extreme and outrageous conduct.'" Pretsky v. Southwestern Bell Telephone Co., 396 S.W.2d 566 (Mo. Sup. 1965); Nelson v. Grice, 411 S.W.2d 117 (Mo. Sup. 1967).

Both of the cited cases quote at length from the Restatement's comment on the type of conduct which will give rise to such liability. Essentially the conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement, § 46 p. 73. Warrem v. Parrish, 436 S.W.2d 670, 673 (Mo. Supp. 1969).

In passing upon the sufficiency of plaintiffs' complaint, the Court must consider the truth of the facts alleged, giving them liberal construction and give plaintiff the benefit of all fair implications from such facts. Matthews v. Pratt, 367 S.W.2d 632,634 (Mo. Supp. 1963).

In the present case plaintiffs allege that defendants willfully issued a sanction report calling for permanent exclusion which contained manufactured and fabricated matters and refused to provide plaintiff Kwoun notice of charges or any opportunity to explain his situation. Plaintiff further alleges that defendants thereafter pursued the matter through the statewide council and HCFA, with notice to the public, deliberately misstating facts, and contriving exhibits in their efforts to further prosecute him. Plaintiff alleges not one act but a continuous course of conduct. If the facts plaintiff alleges are true, reasonable men might well consider defendants' actions of such an extreme and outrageous nature as will render them liable for extreme emotional distress

intentionally caused thereby.

M.

Defendants seek next to dismiss plaintiffs' claim for prima facie tort. The doctrine of prima facie tort, which first appeared in the Restatement, has been adopted by the courts of Missouri, Porter v. Crawford, 611 S.W.2d 265 (Mo. App. 1980). However, as is clearly set out in the Restatement, the doctrine is applicable only when the factual basis of the complaint does not fall within the parameters of an established tort.

Thus, application of the doctrine is not justified here as plaintiff has factually alleged malicious prosecution and outrageous conduct which are torts presently recognized by Missouri courts.

Plaintiffs have cited the case of Lohse v. St. Louis Children's Hospital,

646 S.W.2d 130 (Mo. App. 1983) to support the position that an alternative tort claim does not defeat the prima facie tort claim. The court in Lohse, however, dismissed plaintiff's claim because plaintiff failed to plead any facts to support the claim. The court made no comment as to the appropriateness of a prima facie tort claim pled as a second cause with wrongful discharge. Id. at 130-31.

Accordingly, because plaintiffs have alleged the same set of facts as malicious prosecution and prima facie tort, this Court will dismiss the prima facie tort claim.

N.

Finally, defendants seek summary judgment on all counts:

> Summary judgment is an extreme remedy, one which is not to be

entered unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discerible circumstances.

* * * * *

... the Supreme Court set the standard that should be applied when one party to a lawsuit in federal court makes a motion for a summary judgment:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, ... [and where] no genuine issue remains for trial ... [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'

Ozark Milling Co. v. Allied Mills, Inc., 480 F.2d 1014, 1015 (8th Cir. 1973);

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944).

In the present case plaintiffs have alleged violations of the civil rights statutes, malicious prosecution, conspiracy, and outrageous conduct. Each of these charges are in themselves questions of fact in that their ultimate determination revolves on findings of motivation, intent, good-faith, and subjective feelings. The Eighth Circuit has determined that summary judgment is notoriously inappropriate for a determination of claims on which the issue of intent, good-faith, or other subjective feelings played dominate roles. McGee v. Hester, 724 F.2d 89, 91 (8th Cir. 1984). In this instance this Court finds summary judgment inappropriate due to the inherently

factual nature of plaintffs' claims and the belief that reasonable minds could differ as to defendants' culpability for their alleged actions.

Accordingly, defendants' motions will be granted in part and denied in part.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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No. S84-259 C(D)

==========

Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

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Filed March 27, 1986

MEMORANDUM

This matter is before the Court ua sponte.

FACTUAL BACKGROUND

Plaintiffs brought this action as a result of an initial determination by the Health Care Financing Administration (HCFA), which excluded plaintiffs from

the Medicare reimbursement program. This decision was made pursuant to the recommendations and efforts of the defendants. Plaintiffs subsequently filed an action before an Administrative Law Judge pursuant to the appeals provisions of 42 U.S.C. § 1320(c). The ALJ reversed the HCFA decision and reinstated plaintiffs to the reimbursement program. Kwoun v. Southeast Mo. Pro. Standards Review Org., 622 F.Supp. 520, 523 (E.D. Mo. 1985). Plaintiff then filed the instant action alleging various civil rights and tort violations. However, all of plaintiffs' allegations may be categorized as an action for malicious prosecution which resulted in various alleged constitutional deprivations.[1]

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[1] For a complete recital of plaintiffs' allegations see Kwoun v. Southeast Mo. Pro. Standards Review Org.,

The Court on its own motion now considers the question of whether defendants are entitled to any immunity from actions, such as the above-styled matter, due to their congressional mandate to conduct intensive reviews of government funded health services. For the reasons set forth below, the Court finds that defendants are entitled to immunity and, thus, this action must be dismissed.

History and Evolution of PSROs

The health care delivery system in the United States is the first industry to be comprehensively regulated since the 1930s. Health expenditures continue to escalate out of proportion to the rest of the economy. As long ago as 1976, 42.2%

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supra at 523.

of the nations health expenditures came from public funds. Gibson & Mueller, National Health Expenditures, Fiscal Year 1976, Soc. Sec. Bull. 3, 4. Publicity generated by instances of fraud and other abuse in government funded health programs focused attention on both the dubious quality and the unnecessary quantity of the health care delivered in this country. Miller, PSRO Data and Information: Disclosure to State Health Regulatory Agencies, 57 Boston U.L. Rev. 245, 246 (1977).

When it established Medicare and Medicaid in 1965, Congress recognized the need to curb practitioner and provider induced demand in order to contain the cost of government funded medical services. Id. To this end payments under these programs are limited to medically

necessary health care services. 42 U.S.C. § 1395(f)(7); § 1396. Congress required each hospital to organize a committee of physicians to evaluate the necessity of health care provided therein. See 42 U.S.C. § 1395X(e)(6); 45 C.F.R. §§ 250. 18, .19 (1975). Those internal review activities, however, were nothing more than token lip service and could be aptly characterized as more form than substance. S. Rep. No. 1230, 92nd Cong., 2nd Sess. 255 (1972). Congress needed to put teeth into the requirement that federally financed health care be medically necessary. In order to promote effective, efficient, and economical delivery of Medicare and Medicaid, Congress enacted the PSRO Amendment to the Social Security Act. Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. II, 249F(b), 86 Stat.

1429 (modified at 42 U.S.C. § 1320c, et seq. (Sup. II, 1972), as amended, (Supp. V, 1975). Thus, the PSRO Amendment was adopted in response to recognition that the original review system incorporated into the Medicare Program failed to control the costs of government sponsored medical care.

This legislation established a system of external monitoring of institutionally based health care services which Congress intended would be free from the conflicts of interest inherent in the old in-house review methods. PSROs are to determine (1) whether particular institutionally based services are medically necessary, (2) whether they are of acceptable quality, and (3) whether appropriate care could effectively be provided on an outpatient basis or more

economically in an inpatient facility of a different type. 42 U.S.C. § 1320c-4(a)(1). The PSRO is also provided with various enforcement sanctions. Among these sanctions is the recommendation that the practitioner or provider be prohibited from participation in the reimbursement programs. 42 U.S.C. §1320c-9(b)(1) (Supp. II, 1972).

Sanctions are appropriate whenever a practitioner or provider has "grossly and flagrantly" violated the statute or has failed to comply with his statutory obligations in a substantial number of cases. Id. In the instant case, defendants found that plaintiffs had violated the statute to such an extent as to warrant imposition of sanctions. The HCFA agreed and plaintiffs were excluded from participation in the Medicare and

Medicaid reimbursement programs.

Immunity of PSROs

Congress did not specifically provide PSROs with immunity from legal actions such as that in the instant matter. However, a careful review of the legislative history of the PSRO Amendment clearly indicates that some form of immunity is both necessary and desirable.

In formulating the present PSRO Amendment, Congress was convinced that the old utilization review system was simply not adequate; in fact, the old system was characteristically ineffective. It was fragmented, retrospective, and incomplete. Numerous witnesses who testified before the Senate Subcommittee stated that a significant proportion of the health services provided under Medicare and Medicaid were in excess of those

which would be found medically necessary, and the old system failed to prevent this from happening. 117 Cong. Rec. 21266 (6/11/71).

The key to making a PSRO work effectively is the degree of motivation and sincerity of the physicians and medical organization in each area. 117 Cong. Record 21267 (6/22/71). The stakes are too high and public concern and scrutiny too great for anyone to delude himself that a pro forma PSRO will be acceptable. Id. Substance and not form must be the test of a PSRO. Performance and professionalism will be the criteria of judgment.

From the foregoing, it is abundantly clear that Congress expected that PSROs would conduct active, comprehensive, and probing reviews even if such reviews are

not popular with the providers under investigation. Without such an intent, Congress would have left the weak and ineffective rubber stamping method in place.

In the instant case, defendants conducted a review just as Congress anticipated all PSROs should. At the completion of this review, defendants recommended that plaintiffs be excluded from the various government reimbursement programs. HCFA agreed with defendants' recommendation and issued an order to that effect.

Plaintiffs took advantage of the appeals process as provided by the statute. 42 U.S.C. § 1320(c). In this instance, the appeals process worked in plaintiffs' favor and the HCFA ruling was reversed. Thus, to this point in the

proceedings, the review process functioned just as Congress anticipated it should.

However, plaintiffs then brought the instant action. This action has thrown Congress's well-intentioned and carefully constructed plan into chaos. How can a PSRO be expected to conduct extensive reviews if by doing so it becomes the target of a lawsuit such as the above-styled matter? Quite obviously it cannot. The instigation of lawsuits such as this will have a chilling effect upon the vigor with which these reviews will be undertaken. This was simply not Congress' intent.

Immunity has consistently been provided for groups and individuals who, by legal mandate, are charged with undertaking unpopular tasks.

The most recent example is articulated in Malley, et al. v. Briggs, et al., ___ U.S. ___ (slip opinion) (3/5/86). In Malley the Supreme Court ruled that police officers who believed that the facts stated in an affidavit are true and submits them to a neutral magistrate may be entitled to immunity under the objective reasonableness standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Under this ruling officers cannot avoid liability under the rule of qualified immunity on the grounds that the act of applying for an arrest warrant is per se objectively reasonable where the officer believes that the facts alleged in his affidavit are true, and that he is entitled to rely on the judicial officer's judgment in issuing

the warrant and hence finding that probable cause exists. The question is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the application for the warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest.

In the instant case, the same type of immunity should be afforded. Defendants, like the officer in Malley, investigated a situation and presented their findings to a neutral party for a determination on their recommendation. As in Malley where the magistrate issued the requested warrants, the Director of HCFA acted favorably on defendants'

recommendation. Subsequently, plaintiffs obtained a reversal through the appeals process just as in Malley, the grand jury refused to indict, and charges were dropped. The question then becomes whether defendants herein knew or should have known that their recommendation was improper. If this question is answered in the negative then defendants are immune from liability under the immunity theory articulated in Malley. In Malley the court determined that only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. Malley, et al. v. Briggs, supra, slip op. p. 9.

Here, if defendants' recommendations were so lacking in factual basis that

defendants could not have believed them to be proper, plaintiffs' action should stand. However, after careful consideration of all pleadings and supporting documents, the Court finds that defendants conducted their review just as Congress intended. Further, defendants' recommendations were made with objective belief that plaintiffs should be excluded from the reimbursement programs based upon the facts uncovered in defendants' investigation. Thus, defendants should be shielded from liability pursuant to the Supreme Court's ruling in Malley.

As the foregoing clearly indicates, Congress has determined that comprehensive review of government funded health care is in the public interest. Yet Congress did not specifically provide immunity to encourage PSROs to vigorously

pursue their appointed tasks. The Court will correct Congress' oversight with its ruling today. Plaintiffs and those similarly situated must not be allowed to use the Court system to gain revenge for actions which Congress ordered PSROs to undertake. Accordingly, this Court will enter an Order dismissing plaintiffs' complaint based upon defendants' inherently necessary immunity.

Dated this 27th day of March, 1986.

s/s
H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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No. S 84-259 C(D)

==========

Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

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Filed June 3, 1986

MEMORANDUM AND ORDER

The matter is before the court upon plaintiffs' motion to alter or amend judgment and to clarify judgment.

On March 2, 1986, this Court dismissed the above styled matter. First, plaintiffs are concerned in their motion for clarification as to whether

the Court intended to dismiss all defendants. The Court understands that plaintiffs are concerned that this Court may not have jurisdiction over defendants Kram, Nicholson, and Howard. To that end the Court considers its March 27, 1986 order to overrule its September 19, 1985 order denying said defendants' motions to dismiss. Thus, the Court has, by its March 27, 1986 order, dismissed all defendants.

Next, plaintiffs move this Court to alter or amend its March 27, 1986 order. The basis for plaintffs' motion is plaintiffs' perception that the Court overlooked or ignored the provisions of 42 U.S.C. § 1320(c)-6. While this Court's March 27, 1986 order does not mention 42 U.S.C. § 1320(c)-6, the Court did consider said section. This section

provides support for the Court's contention that Congress intended to provide immunity. The section does not provide guidelines as to how the immunity is to be applied under any given set of circumstances. It is clear, however, that the type of immunity that this Court found controlling in its March 27, 1986 order is compatible with the type of immunity Congress attempted to provide in 42 U.S.C. § 132(c)-6. Therefore, this Court's determination that defendants are protected by a qualified immunity based upon a standard of objective reasonableness shall not be altered.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion to alter or amend this Court's March 27, 1986 order be and is DENIED; and

IT IS FURTHER ORDERED that plaintiffs' motion to clarify this Court's March 27, 1986 order be and is DENIED.

Dated this 3rd day of June, 1986.

s/s
H. Kenneth Wangelin
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S84-259 C(D)

Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

ORDER

In accordance with the Memorandum filed this date and incorporated herein,

IT IS HEREBY ORDERED that the above-styled matter be and is DISMISSED.

Dated this 27th day of March, 1986.

s/s
H. Kenneth Wangelin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 85-2379

==========

Soung O. Kwoun, et al.,

Appellees,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Appellants.

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Nos. 86-1502/1838

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Soung O. Kwoun, et al.,

Appellants,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri

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JUDGMENT

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

February 4, 1987

Order entered in accordance with opinion.

s/s
Clerk, U.S. Court of Appeals, 8th Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 85-2379EM

==========

Soung O. Kwoun, et al.,

Appellees,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellants.

==========

No. 86-1502/1838EM

==========

Soung O. Kwoun, et al.,

Appellants,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri

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ORDER

Petition for rehearing en banc of Soung O. Kwoun, et al., has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 9, 1987

Order entered at the Direction of the Court:

s/s
Clerk, U.S. Court of Appeals
Eighth Circuit.

Constitutional Provision Involved

This case involves the Fifth Amendment to the Constitution of the United States which provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

STATUTES INVOLVED

42 U.S.C. § 1320c-5.

> (a) Each Professional Standards Review Organization shall apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice in its regions (including typical lengths-of-stay for institutional care by age and diagnosis) as principal points of evaluation and review. The National Professional Standards Review Council and the Secretary shall provide such technical assistance to the organization as will be helpful in utilizing and applying such norms of care, diagnosis, and treatment. Where the actual norms of care, diagnosis, and treatment in a Professional Standards Review Organization area are significantly different from professionally developed regional norms of care, diagnosis, and treatment approved for comparable conditions,

the Professional Standards Review Organization concerned shall be so informed, and in the event that appropriate consultation and discussion indicate reasonable basis for usage of other norms in the area concerned, the Professional Standards Review Organization may apply such norms in such area as are approved by the National Professional Standards Review Council.

. . .

(c)(2) Each review organization, agency, or person referred to in paragraph (1) shall utilize the norms developed under this section as a principal point of evaluation and review for determining, with respect to any health care services which have been or are proposed to be provided, whether such care and services are consistent with the criteria specified in section 1320c-4(a)(1) of this title.

42 U.S.C. § 1320c-6.

. . .

(b) No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organizations, shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part ~~or to~~ a valid contract

entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) provided he has exercised due care.

. . .

Aug. 14, 1935, c. 531, Title XI, § 1157, as added Sept. 3, 1982, Pub.L. 97-248, Title I, § 143, 96 Stat. 389.)

42 U.S.C. § 1320c-8.

(a) Any beneficiary or recipient who is entitled to benefits under this chapter (other than subchapter V) or a provider or practitioner who is dissatisfied with a determination with respect to a claim made by a Professional Standards Review Organization in carrying out its responsibilities for the review of professional activities in accordance with paragraphs (1) and (2) of section 1320c-4(a) of this title shall, after being notified of such determination, be entitled to a reconsideration thereof by the Professional Standards Review Organization and, where the Professional Standards Review Organization reaffirms such determination in a State which has established a Statewide Professional Standards Review Council, and where the matter in controversy is $100 or more, such determination shall be reviewed by professional members of such Council

and, if the Council so determined, revised.

(b) Where the determination of the Statewide Professional Standards Review Council is adverse to the beneficiary or recipient (or, in the absence of such Council in a State and where the matter in controversy is $100 or more), such beneficiary or recipient shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, where the amount in controversy is $1,000 or more, to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. The Secretary will render a decision only after appropriate professional consultation on the matter.

(c) Any review or appeals provided under this section shall be in lieu of any review, hearing, or appeal under this chapter with respect to the same issue.

42 U.S.C. § 1320c-9.

. . .

(b)(1) If after reasonable notice and opportunity for discussion with the practitioner or provider concerned, any Professional Standards Review Organization submits a report and recommendations to

the Secretary pursuant to section 1320c-6 of this title (which report and recommendations shall be submitted through the Statewide Professional Standards Review Council, if such council has been established, which shall promptly transmit such report and recommendations together with any additional comments and recommendations thereon as it deems appropriate) and if the Secretary determines that such practitioner or provider, in providing health care services over which such organization has review responsibility and for which payment (in whole or in part) may be made under this chapter has--

> (A) by failing, in a substantial number of cases, substantially to comply with any obligation imposed on him under subsection (a) of this section, or
>
> (B) by grossly and flagrantly violating any such obligation in one or more instances,

demonstrated an unwillingness or a lack of ability substantially to comply with such obligations, he (in addition to any other sanction provided under law) may exclude (permanently for such period as the Secretary may prescribe) such practitioner or provider from eligibility to provide such services on a reimbursable basis.

(2) A determination made by the Secretary under this subsection shall be effective at such time and upon such reasonable notice to the public and to the person furnishing the services involved as may be specified in regulations. Such determination shall be effective with respect to services furnished to an individual on or after the effective date of such determination (except that in the case of institutional health care services such determination shall be effective in the manner provided in subchapter XVIII of this chapter with respect to terminations of provider agreements), and shall remain in effect until the Secretary finds and gives reasonable notice to the public that the basis for such determination has been removed and that there is reasonable assurance that it will not recur.

(3) In lieu of the sanction authorized by paragraph (1), the Secretary may require that (as a condition to the continued eligibility of such practitioner or provider to provide such health care services on a reimbursable basis) such practitioner or provider pay to the United States, in case such acts or conduct involved the provision or ordering by such practitioner or provider of health care services which were medically improper or unnecessary, an amount not in excess of the actual or estimated cost of

the medically improper or unnecessary services so provided, or (if less) $5,000. Such amount may be deducted from any sums owing by the United States (or any instrumentality thereof) to the person from whom such amount is claimed.

(4) Any person furnishing services described in paragraph (1) who is dissatisfied with a determination made by the Secretary under this subsection shall be entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

42 U.S.C. § 1320c-16.

. . .

(b)(1) No individual who, as a member or employee of any Professional Standards Review Organization or of any Statewide Professional Standards Review Council or who furnishes professional counsel or services to such organization or council, shall be held by reason of the performance by him or any duty, function, or activity authorized or required of Professional Standards Review Organizations or of Statewide Professional Standards Review Councils under this part, to have vio-

lated any criminal law, or to be civilly liable under any law, of the United States or of any State (or political subdivision thereof) provided he has exercised due care.

(2) The provisions of paragraph (1) shall not apply with respect to any action taken by any individual if such individual, in taking such action, was motivated by malice toward any person affected by such action.

. . .

As amended Oct. 25, 1977, Pub.L. 95-142, § 5(i) (n), 91 Stat. 1190, 1191.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977.)

42 U.S.C. § 1985(3):

> (3) If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

REGULATIONS INVOLVED

42 C.F.R. § 474.3 PSRO responsibilities.

(a) The PSRO shall identify situations that may result in a violation of the obligations specified in § 474.1 and help to prevent their occurrence as provided in § 474.4.

(b) The PSRO shall determine when a violation of an obligation has occurred and report the matter, with recommendations for action, to the Statewide Council of, if there is no Council, to HCFA.

(c) The PSRO shall use the authority or influence it may prossess and enlist the support of other professional or government agencies, including the State Medicaid Agency, to ensure that each practitioner and provider complies with the obligation of § 474.1.

42 C.F.R. § 474.4 Action on potential violation.

If a PSRO identifies a situation that may result in a violation, it shall send the practitioner or provider a written notice containing the following information:

(a) The obligation involved;

(b) The situation, circumstances, or activity which, if continued, may result in a violation;

(c) The authority and responsibility of the PSRO to report a violation of obligations;

(d) At the discretion of the PSRO, a suggested method for correcting the situation and a time period for corrective action by the practitioner or provider;

(e) The sanction that the PSRO could recommend if a violation occurs; and

(f) An invitation to discuss the problem with representatives of the PSRO.

42 C.F.R. § 474.5 Factors in PSRO determination of a violation.

If the PSRO identifies a violation, it shall determine:

(a) Which obligation specified in § 474.1 has been violated; and

(b) Whether the practitioner or provider has:

(1) Failed to comply substantially with an obligation in a significant number of cases; or

REGULATIONS INVOLVED

42 C.F.R. § 474.3 PSRO responsibilities.

(a) The PSRO shall identify situations that may result in a violation of the obligations specified in § 474.1 and help to prevent their occurrence as provided in § 474.4.

(b) The PSRO shall determine when a violation of an obligation has occurred and report the matter, with recommendations for action, to the Statewide Council of, if there is no Council, to HCFA.

(c) The PSRO shall use the authority or influence it may prossess and enlist the support of other professional or government agencies, including the State Medicaid Agency, to ensure that each practitioner and provider complies with the obligation of § 474.1.

42 C.F.R. § 474.4 Action on potential violation.

If a PSRO identifies a situation that may result in a violation, it shall send the practitioner or provider a written notice containing the following information:

(a) The obligation involved;

(2) The obligation violated;

(3) The basis for the determination;

(4) The sanction to be recommended; and

(5) The right of the practitioner or provider to submit to the PSRO, within 20 days of the date on the notice, additional information or written request for a meeting with the PSRO to review and discuss the determination, or both.

(b) Review of determination.

(1) The PSRO may, on the basis of additional information submitted by the practitioner or provider, affirm, modify, or reverse its determination or the sanction to be recommended; and

(2) The PSRO shall promptly give written notice to the practitioner or provider of any action it takes as result of the additional information received.

42 C.F.R. § 474.8 PSRO report to the Statewide Council or to HCFA.

(a) Manner of reporting. If the PSRO determines that a violation has occurred, it shall submit a report to the Statewide Council or, if there is no council, directly to HCFA.

(b) Content of the report. The PSRO report shall include:

(1) Identification of the practitioner or provider and in the case of a provider, the name of its director, administrator, or owner;

(2) The type of health care service involved;

(3) A statement of facts describing each failure to comply with an obligation, with specific dates, places, circumstances, and any other relevant information;

(4) Pertinent documentary evidence;

(5) Copies of written correspondence and written summaries of oral exchanges with the practitioner or provider regarding the violation;

(6) The PSRO's determination that the practitioner or provider has violated an obligation under the Act; and

(7) The PSRO's recommendation of the sanction, if any, and the basis for that recommendation.

42 C.F.R. § 474.9 Role and functions of the Statewide Council.

(a) Council review and comment. The Council shall:

(1) Review the report submitted by the PSRO to assure that it is complete and complies with all requirements set forth in § 474.8(b); and

(2) Prepare a statement concurring or nonconcurring with the PSRO's recommended action and identifying any areas in which the PSRO report is incomplete.

(b) Transmittal to HCFA. The Council shall promptly transmit to HCFA the PSRO report and its statement of concurrence or nonconcurrence with any additional comments or recommendations.

42 C.F.R. § 474.10 Action by HCFA on receipt of the report.

(a) Determination of violation. HCFA will review the PSRO report and determine (on the basis of the factors specified in § 474.5) whether a violation has occurred.

(b) Determination of sanction. If HCFA concludes that there is a violation, it will determine whether to impose a sanction after considering:

(1) The recommendation of the PSRO and the Statewide Council;

(2) The type of offense;

(3) The severity of the offense;

(4) The anticipated deterrent effect of the sanction;

(5) The previous sanction record of the practitioner or provider;

(6) Availability of alternative sources of services in the community; and

(7) Any other matters relevant to the particular case.

(c) Notice of proposed sanction. (1) If HCFA proposes to impose a sanction in accordance with §472.2 (or to terminate a provider agreement in accordance with § 405. 614(a)(5)), it will send the provider or practitioner written notice of its intent and the reasons for the proposed sanction.

(2) Within 15 days of the date on the notice, the provider or practitioner may submit documentary evidence and written argument concerning the proposed action.

(3) For good cause shown by the provider or practitioner, HCFA may extend the 15-day period.

(d) Notice to provider or practitioner and the State Medicaid and Title VI agencies. (1) If, after exhaustion of the procedures

specified in paragraph (c) of this section, HCFA decides to impose a sanction, it will notify the provider or practitioner and the State Medicaid and Title V agencies of the adverse determination and of the sanction to be imposed at least 30 days before the effective date of the sanction.

(2) The notice will specify:

(i) The basis for the determination;

(ii) The sanction to be imposed;

(iii) The effective date and, if appropriate, the duration of the exclusion;

(iv) The appeal rights of the practitioner or provider; and

(v) In the case of exclusion, the earliest date on which HCFA will accept a request for reinstatement.

(e) Public Notice. HCFA will publish notice in a newspaper of general circulation in the PSRO area. The notice will identify the sanctioned provider or practitioner; the obligation in § 474.1 which has been violated; specify the sanction imposed and, if the sanction is exclusion, the effective date and duration.

(f) Notice to other affected entities. HCFA will give notice, as appropriate, to:

(1) The PSRO that originated the sanction report and the Statewide Council involved;

(2) PSROs in adjacent areas;

(3) State Medicaid fraud control units, and State licensing bodies;

(4) Hospitals, skilled nursing facilities, home health agencies, and health maintenance organizations (HMO's);

(5) Medical societies and other professional organizations; and

(6) Medicare carriers and intermediaries, health care prepayment plans, and other affected agencies and organizations.

(g) Effect of HCFA determination.

(1) A practitioner or provider dissatisfied with a HCFA determination is entitled to a hearing and review by the appeals council in accordance with §§ 405.1531 through 405.1595 of this chapter.

(2) The HCFA determination will continue in effect unless revised by a hearing decision.

PROGRAM MANUAL

The Department of Health, Education and Welfare recognizes that PSROs operate as independent, private, nonprofit corporations. However, included in each PSRO's activities is the performance, under contract with HCFA, of a statutory and regulatory function supported by Federal funds, as noted above.

Supreme Court, U.S.
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No. 86-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,
Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,
Respondents.

BRIEF OF THE SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 86-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,
Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,
Respondents.

BRIEF OF THE SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents, the Southeast Missouri Professional Standards Review Organization, its physician participants and administrator[1] submit this Brief in opposition to the Petition for Writ of Certiorari filed by Petitioners, Dr. Soung O. Kwoun and his related corporations. The opinion of the United States Court of Appeals for the Eighth Circuit, below, is a straightforward application of *Butz v. Economou,* 438 U.S. 478 (1978) to the facts presented. The issues truly raised by this case involve no conflict among the Circuits nor novel doctrinal questions. Therefore, the Writ should be denied.

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[1] A listing of the SEMO PSRO respondents is set forth as Addendum "A" to this Brief.

STATEMENT OF THE CASE

Dr. Soung O. Kwoun is a physician who was suspended from eligibility to participate in the Medicare program and thereafter reinstated in the program through the administrative review process. After being reinstated and receiving full compensation for all past Medicare services provided, Petitioner Kwoun (with his corporations) brought this suit against numerous persons allegedly involved in the suspension decision.

Petitioners named as defendants in this suit some 45 physicians who at one time participated in the operation of the Southeast Missouri Professional Standards Review Organization (SEMO PSRO), the administrator of the SEMO PSRO, officials of the federal Health Care Financing Administration (HCFA), and others. Petitioners claim the various SEMO PSRO officials (including several physicians who are themselves members of minority groups) and the HCFA officials all conspired to suspend Dr. Kwoun's participation in the Medicare program on the basis of his race, denied him due process of law, and committed various common law torts through exercise of their sanctioning authority.

The Administrative Framework of the Medicare Program

The SEMO PSRO is part of a system of local-area peer review established by Congress to aid HCFA, a division of the Department of Health and Human Services (HHS), in the regulation of the Medicare program. 42 U.S.C. §§ 1320c *et seq*. The SEMO PSRO operates through a committee of physicians practicing in the southeast Missouri region, who have volunteered to participate in the PSRO's public responsibilities. See 42 U.S.C. § 1320c-1(b)(1)(A) (Supp. IV 1974).

PSROs are charged by Congress with performance of a variety of review and evaluative functions. Among these functions, a PSRO is required to determine whether physicians are meeting their obligations to provide high quality and reasonably

necessary health care to Medicare recipients. Should a PSRO determine that a physician is violating his obligations under the Medicare program, the PSRO is required to initiate an administrative action against the physician by issuing a report to HCFA charging the physician with case-specific violations and proposing appropriate sanctions. 42 U.S.C. §§ 1320c-4(a)(1), 1320c-6, 1320-9(b)(1) (Supp. IV 1974). The Medicare Act provides extensive procedural safeguards throughout the sanctioning process, including rights to administrative and judicial review.[2]

The Administrative Proceeding Involving Dr. Kwoun

The SEMO PSRO's review began as a result of notification from HCFA that the hospital readmission rate[3] of Medicare patients in the southeast Missouri region was the highest in the nation. (III CA App. 365)[4] The SEMO PSRO's evaluation of the

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[2] Under applicable administrative regulations, following a PSRO's sanction report, HCFA must give the physician notice of the proposed sanction. The physician may obtain oral hearing before HCFA or submit written evidence and argument. 42 C.F.R. §420.102(a) (1980). If a sanction is imposed, HCFA must send the doctor a notice stating the reasons. 42 C.F.R. §420.102(b) (1980). The physician may appeal the decision to an administrative law judge [42 C.F.R. §420.102(b)(3)] for a formal hearing with right of cross-examination and a decision based upon the evidence of the record [42 C.F.R. §§ 405.1502(e), 405.1530, 405.1533 *et seq.*, 405.1547, 405.1557]. Further appeal may be taken to the Secretary's Appeals Council. 42 C.F.R. §405.1561. Judicial review may then be obtained in federal district court. 42 U.S.C. §§ 405(g), 1395(d)(3).

[3] The hospital readmission rate is a standard applied in administering the Medicare program which measures the frequency enrollees are being hospitalized.

[4] The Court of Appeals Appendix is cited as "CA App.", preceded by reference to the volume (I-VII) and followed by citation to the appropriate pages.

problem focused on Poplar Bluff Hospital[5] and ultimately on Dr. Kwoun.

The PSRO initially reviewed the records of patients of the Poplar Bluff Hospital having been hospitalized six or more times. This review was conducted on a blind basis, so that the patient files did not disclose the identity of the treating physician. (I CA App. at 117) Having culled those patient records indicating inadequate care, the PSRO discovered that Dr. Kwoun was the treating physician on an inordinate number of the problem-files. (I CA App. at 143-148) The SEMO PSRO communicated both orally and in writing with Dr. Kwoun and offered Dr. Kwoun other opportunities to meet with the PSRO. (II CA App. at 334-336)

As a result of their evaluation of the patient records, the PSRO officials determined (a) that in 23 specific cases the treatment accorded Medicare recipients by Dr. Kwoun failed to meet professionally accepted standards and (b) that these failings justified their recommendation to HCFA that Dr. Kwoun be suspended from the Medicare program. (I CA App. at 45)

After the PSRO presented their evidence of the 23 alleged violations through a report sent to HCFA and prior to the imposition of sanctions, the Central Office of HCFA sent Dr. Kwoun a notice formally proposing to exclude him from Medicare eligibility for 10 years. The notice further advised Dr. Kwoun of his right to appear in person before HCFA and present written evidence in opposition to the proposed sanction. (I CA App. at 171-174)

Petitioner Kwoun took advantage of this opportunity for a hearing and appeared, with counsel, at the administrative review before the HDFA's Director of Quality Control. During

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[5] The average readmission rate of the 21 hospitals in the southeast Missouri region was 34.1 per 100 patients. Poplar Bluff Hospital's rate was 70 per 100 patients. (I CA App. 117)

the hearing, Dr. Kwoun addressed on a case-by-case basis the patient files identified as giving rise to the administrative charges. (II CA App. at 182-309) The evidence adduced at the HCFA hearing was then submitted to the SEMO PSRO for its further review and analysis. (III CA App. at 383-384) In addition, Dr. Kwoun (through counsel) followed the hearing with lengthy written comments on the PSRO's conclusions respecting each patient file. (II CA App. at 311-316) The SEMO PSRO considered and responded in writing to Dr. Kwoun's comments, adhering to its conclusion that the doctor's treatments were improper. (II CA App. at 317) Dr. Kwoun then submitted further written comments. (II CA App. at 318-332)

After the hearing and the exchange of comments, the HCFA determined Dr. Kwoun would be excluded from particpation in the Medicare Program for a period of ten years pursuant to 42 U.S.C. §1395y(d)(1)(C). The HCFA decision was accompanied by a statement detailing the basis for the suspension and further advised the doctor of his right to a hearing before an administrative law judge (ALJ). (II CA App. at 333-337)

Prior to the effective date of the HCFA decision, Dr. Kwoun filed suit in the United States District Court for the Eastern District of Missouri to enjoin the suspension. *Kwoun v. Schweiker,* 528 F.Supp. 1004, (E.D.Mo. 1981). The court dismissed the suit for failure of Dr. Kwoun to exhaust his administrative remedies. Necessary to ruling that it lacked jurisdiction, the district court independently reviewed the administrative proceedings which had theretofore taken place and specifically held that the administrative actions disclosed no "colorable constitutional claim" and that "the agency will be capable to correct any procedural defects in a later evidentiary hearing." 528 F.Supp. at 1009.

Dr. Kwoun took advantage of the further evidentiary hearing before the ALJ, who found in the doctor's favor. Dr. Kwoun was then restored to full Medicare eligibility and received complete compensation for all Medicare services he had rendered during the period the suspension was under review. (III CA App. at 530) The present suit followed.

REASONS FOR DENYING THE WRIT

Federal officials, engaged in discretionary prosecutorial or quasi-judicial conduct, are protected by absolute immunity not only from common-law claims but also from constitutional or civil rights claims. *Butz v. Economou,* 438 U.S. 478, 508-16 (1978). The present case involves the routine (and correct) application of *Butz* and its progeny to the facts presented. It presents no novel doctrinal issues nor any split among the Circuits.[6]

Entitlement to the immunity afforded by *Butz* turns on the public function being performed, not on an individual's title nor on whether his employer is a governmental agency. See *Austin Municipal Securities, Inc. v. National Association of Securities Dealers,* 757 F.2d 676 (5th Cir. 1985) (stockbroker members of a local disciplinary committee of the securities industry's self-regulatory body absolutely immune in determining whether a brokerage house should be sanctioned). *Accord, Simons v. Bellinger,* 643 F.2d 774 (D.C. Cir. 1980); *Slavin v. Curry,* 574 F.2d 1256 (5th Cir. 1978) (attorney-members of bar disciplinary committees). *See also Gross v. Sederstrom,* 429 F.2d 96 (8th Cir. 1970) (local farmers serving on a committee

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[6] Petitioners attempt to construct a "split among the Circuits" by citing a laundry-list of cases wherein courts addressed the type of immunity to be accorded a variety of officials in cases involving a multitude of differing official functions under widely differing factual situations. These cases are not before the Court. Petitioners point to no Circuit Court decision involving the immunity of PSRO officials, officials acting within the Medicare program, or even officials of any industry or professional self-regulatory body, which conflicts with the decision of the Eighth Circuit here. Petitioners' reference to two cases holding PSROs not subject to the Freedom of Information Act, simply does not get to the issues at hand — whether and to what degree physicians, when performing prosecutorial duties through a PSRO and under a comprehensive federal regulatory program, are entitled to immunity.

determining eligibility to participate in federal farm support programs).[7]

The application of absolute immunity from constitutional tort and common law claims to such persons as stockbrokers (*Austin*) and attorneys (*Simons; Slavin*), exercising their prosecutorial discretion in intitiating disciplinary proceedings within comprehensive regulatory programs, is indistinguishable from the application of absolute immunity to the SEMO PSRO doctors under the facts here. Indeed, Petitioners, themselves, acknowledged in a Brief filed in the Eighth Circuit that the SEMO PSRO defendants stand in the same legal relationship as the disciplinary committee members in *Austin*. In their Brief, Petitioners stated: "[T]he disciplinary officials afforded ab-

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[7] Indeed, professional or industry self-regulatory bodies now occupy an important place in the effectuation of important federal policies and programs. Congress, often times and in a myriad of contexts, has determined that its regulatory objectives are best and most efficiently served by calling upon members of a profession to perform regulatory duties — duties which Congress might otherwise have assigned to agency officials.

The reason is sound: Professionals working in a field or industry and at the local-level, can bring to bear their expertise in the field and their knowledge of local practice and circumstances. Indeed, this is precisely what Congress contemplated in establishing a nationwide network of PSROs. See *Kwoun v. Schweiker*, 528 F.Supp. at 1005. It would most certainly produce an anomalous result if the immunity which would otherwise apply to an agency official would not be applied to protect individuals (not strictly members of a governmental "agency") merely because Congress chose to utilize the greater expertise of these individuals. Compare *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985) with *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978).

All in all, the application of official immunity to persons appointed to serve as governmental experts and to report on what they find within an overall regulatory scheme, is "consistent with protecting 'officials who are required to exercise their discretion' and [with] promoting the 'public interest in encouraging the vigorous exercise of official authority.' " *Bushman v. Seiler*, 755 F.2d at 656 quoting *Butz v. Economou*, 438 U.S. at 506.

solute immunity in *Austin* are analogous to the PSRO physicians in this case. . . ." (Kwoun Brief in Appeal No. 85-2379 at p. 37).

Furthermore, application of *Butz* to the PSRO's prosecutorial conduct is entirely consistent with repeated decisions holding individuals and entities performing oversight and regulatory functions under the Medicare program entitle to official immunity. *See Bushman v. Seiler,* 755 F.2d 653 (8th Cir. 1985) (physician retained by an insurance company serving as a Medicare carrier absolutely immune in a defamation action arising from his investigation of Medicare services provided by two podiatrists); *cf. Evans v. Wright,* 582 F.2d 20, 21 (5th Cir. 1978) (Medicare program integrity specialists investigating plaintiff's provision of health care service and equipment). *See also Peterson v. Weinberger,* 508 F.2d 45, 51-52 (5th Cir.), *cert. denied,* 423 U.S. 830 (1975); *Matranga v. Travelers Insurance Co.,* 563 F.2d 677 (5th Cir. 1977); *Anderson v. Occidental Life Insurance Co.,* 727 F.2d 855, 856 (9th Cir. 1984) (insurance carriers and intermediaries, required to audit and report to HCFA concerning the provision of Medicare services, held "governmental agents" for immunity purposes).[8]

Moreover, the grant of absolute immunity to disciplinary committee members in *Austin, Simons* and *Slavin* and to the SEMO PSRO physicians here is entirely consistent with the three factors identified by this Court in *Butz v. Economou* for the application of prosecutorial immunity. Under *Butz,* absolute immunity from constitutional and civil rights claims

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[8] In other contexts, as well, private-sector entities have been held governmental actors for the purposes of absolute immunity from suit. See, e.g., *Bradley Computer Sciences Corp.,* 643 F.2d 1029 (4th Cir.), *cert. denied,* 454 U.S. 940 (1981); *Becker v. Philco Corp.,* 372 F.2d 771 (4th Cir.) *cert. denied,* 389 U.S. 979 (1967) (holding government contractors and their employees entitled to official immunity from suits arising from reports submitted to the Department of Defense for governmental purposes).

applies where:

(1) The official's functions share the characteristics of the judicial process;

(2) The official's activities are likely to result in recriminatory lawsuits by disappointed parties; and

(3) Sufficient safeguards exist in the regulatory framework to control unconstitutional conduct.

438 U.S. at 510-13. This case presents a textbook illustration of the *Butz* factors.

A. The Exercise of Prosecutorial Decision-Making

Under the first *Butz* factor, absolute immunity extends to administrative officials exercising "broad discretion in deciding *whether a proceeding should be brought* and *what sanctions should be sought.*" 438 U.S. at 515 (emphasis added).

Here it was the job of the SEMO PSRO physicians to exercise their medical expertise in the enforcement of the Medicare Act. Their review began with an analysis of the general problem of high hospital readmissions within their region, but quickly focused on a specific physician, Dr. Kwoun, whose patient records indicated an inordinate numer of readmissions and, moreover, inadequate care to Medicare recipients. Faced with these records, the PSRO physicians had to determine, in the exercise of their medical judgment, whether and, if so, which specific patient cases revealed violations of Medicare program standards. And, upon this evaluation, they had to and did, in fact, determine "whether a proceeding should be brought" against Dr. Kwoun and "what sanctions should be sought." *Butz,* 438 U.S. at 515.

This decision-making process is precisely that held immunized by the District of Columbia Circuit in *Simons v. Bellinger,* 643 F.2d at 784, with respect to the evaluative efforts related to a bar disciplinary committee's decision to initiate a case. The court in *Simons* held:

> "At some point the prosecutor's inquiry becomes sufficiently focused so that he is preparing a case against a particular defendant rather than seeking a defendant against whom he may prepare a case. At his point, his efforts become advocatory: they are intimately associated with the sensitive decision of whether or not to initiate a particular prosecution, a decision which is left to advocates, not investigators."

Accord, Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979); *Atkins v. Lanning,* 556 F.2d 485, 488 (10th Cir. 1977). Indeed, protection of a prosecutor's investigation is necessary because "[t]o grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decision-making and the potential for needless actions." *Forsyth v. Kleindienst,* 599 F.2d at 1215.

B. The Likelihood of Recriminatory Suits

The protection of officials intimately involved in a prosecutorial decision serves an important public purpose. Addressing the second *Butz* factor, this Court expained: "The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted *if their immunity* from damages arising from that decision *was less than complete.*" *Butz,* 438 U.S. at 515 (emphasis added).

The concern expressed in *Butz* is especially pronounced here. The administration of the Medicare Program requires enforcement of professionally accepted standards of health care and Congress chose to use medical experts through the PSROs — rather than agency officials — to evaluate whether a physician was meeting these standards and to bring charges if the physican was not. If the experts are inhibited from exercising their professional judgment by fear of retaliatory suits, the intended benefits of their unique expertise will be lost. *Cf. Austin*

Municipal, 757 F.2d at 689 (self-regulatory body's members are likely targets for suit).

Thus, where, as here the success of a federal program depends on the effort of private individuals who volunteer to undertake an important public service, the need for the absolute immunity is profound. Commenting on the necessity of absolute immunity for attorneys voluntarily participating on a bar disciplinary committee, the court in *Simons* stated: "Perhaps, without this [absolute] immunity, membership on the Committee would be transformed from a distinguished achievement in public service to an invitation to become a defendant in costly, time-consuming litigation." 643 F.2d at 782.

This necessary application of absolute immunity to officials when functioning, as the PSRO here, in a prosecutorial capacity is entirely consistent with the limitation of liability provision of 42 U.S.C. §1320c-6(b) (relied on by Petitioners for their argument that the PSRO officials should only be accorded qualified immunity). The Eighth Circuit's finding, below, that §1320c-6(b) is not applicable to the PSRO officials when functioning as prosecutors is supported by reason and authority. (*See* Petitioner's Appendix at 33a-35a, n.13).

The doctrine of official immunity bars (a) common-law claims against an official arising out of his public duties and (b) all claims arising out of the performance of prosecutorial duties. On the other hand, §1320c-6(b), far more broadly, bars all civil and criminal liability for all persons performing any services for PSROs if those persons have exercised "due care."

While the initiation of an administrative prosecution is one function of a PSRO, Congress has also charged the PSROs with a wide range of other duties in the administration of the Medicare program. The discharge of many of these day-to-day statutory duties could give rise to statutory claims against per-

sons aiding the PSRO — claims which in many cases would fall out side of the scope of any common law immunity.[9]

Moreover, §1320c-6(b) is not a liability provision. It does not require liability for failure to exercise "due care." As such, the statutory provision cannot be said to foreclose established common law immunities applicable to particular claims and particular and narrow functions of the PSRO. Statutes are to be construed consistent with common law rights and are to be narrowly construed so as not to interfere with common law rights. *See, e.g., United States v. Tilleraas,* 709 F.2d 1088, 1092 (6th Cir. 1983); *Ducey v. United States,* 713 F.2d 504, 510 (9th Cir. 1983). Indeed, even where a statute *expressly* imposes liability, as for example, the Civil Rights Acts, this Court has held that courts should be circumspect in finding that Congress intended to impose liability in situations where common law immunities would otherwise apply. See *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951); *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 258 (1981).[10]

In short, the exercise of prosecutorial discretion is one official function that courts have consistently held requires absolute immunity. *Butz,* 438 U.S. at 515; *Austin Municipal,* 757 F.2d at

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[9] For instance, §1320c-6(b) might apply to a statutory claim against a physician who assisted the PSRO in determining, pursuant to §1320c-3, that certain claims should not be paid; though he would be entitled to the protection of §1320c-6(b), such a physician would not be protected by official immunity, since the claim was not a common law claim and did not arise out of performance of prosecutorial duties. Thus, the limitation of liability of §1320c-6(b) will frequently apply to different sorts of claims and to different persons than the common law doctrine of official immunity.

[10] Furthermore, the existence of statutory immunities applicable in certain circumstances, does not foreclose resort to common law immunities in other situations where such immunities traditionally apply. *See Mendez v. Belton,* 739 F.2d 15, 19 (1st Cir. 1984).

687 ("holding some official positions, however, require greater protection than qualified immunity provides"). Accordingly, there is no reason to suppose that the application of absolute immunity to a PSRO's occasional exercises of prosecutorial authority is inconsistent with §1320c-6(b).

C. Safeguards Provided by the Regulatory Framework

Through the Medicare Act, Congress has carefully tailored a multi-tiered procedural safety net for the administration of payments to and the sanctioning of health care providers under the program. *See* Note 2, *supra*. *Cf. Austin Municipal*, 757 F.2d at 689. Dr. Kwoun vigorously took advantage of his procedural rights throughout the administrative process. He received:

- Oral and written communications with the PSRO during its evaluative process.
- Notice from HCFA of its intent to suspend his Medicare eligibility.
- A pre-suspension hearing before HCFA, at which he (with counsel) presented evidence on each of the PSRO's charges.
- The opportunity to twice submit written comments on the charges to HCFA prior to the suspension decision.
- Judicial review of the constitutionality of the administrative procedures leading up to the suspension. *Kwoun v. Schweiker, supra*.
- A post-suspension evidentiary hearing before an ALJ, which found in his favor.[11]

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[11] Furthermore, had Dr. Kwoun not prevailed before the ALJ, he would have been entitled to an administrative appeal to the Secretary's Appeal Council and then to judicial review of the sanction in federal court.

- Reinstatement in the Medicare Program and full compensation for Medicare services he rendered.

These procedures clearly provide a more than an adequate check on the possibility of unconstitutional conduct, fulfilling the third requirement of *Butz* for the application of absolute prosecutorial immunity. Indeed, in *Kwoun v. Schweiker,* the court expressly found that the administrative record disclosed "no colorable constitutional claim" and that "the agency will be capable to correct any procedural defects in a later evidentiary hearing." 528 F.Supp. at 1009.[12]

Petitioners' present contentions that (a) due process requires greater proceedings than he was accorded (specifically, a "full pre-suspension hearing") and (b) a damages remedy (including punitive damages and attorneys fees) is necessary, are simply unjustified by the administrative record and established law. Absolute immunity to PSRO officials engaged in prosecutorial decision-making is entirely consistent with the procedural and remedial protections available through the Medicare framework. And, the Medicare program's procedures and remedies are, likewise, entirely consistent with due process.

Petitioners simply are not entitled, by virtue of asserting some constitutional claim, to remedies beyond reinstatement in the Medicare program and compensation for Medicare services

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[12] Consistent with the findings in *Kwoun v. Schweiker,* this Court stated in *Butz:*

> "The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an indepen dent judgment as to whether the prosecution is justified. His claims that the proceeding may be unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review." 438 U.S. at 515-16.

rendered. This Court has long recognized that the review and remedial procedures available under a comprehensive regulatory statute may be exclusive and, indeed, preclude the full scope of remedies (such as punitive damages and attorneys fees) as may be available through a civil rights or constitutional tort action. *Bush v. Lucas,* 462 U.S. 367, 378-390 (1983); *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Company,* 379 U.S. 411, 420 (1965) (holding "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive"). *See also Franks v. Nimmo,* 796 F.2d 1230, 1240 (10th Cir. 1986) (dismissing a doctor's constitutional tort suit arising from his discharge from a government hospital on the grounds that remedies available through administrative review, "reinstatement and back pay," provide "meaningful relief" to the exclusion of further remedies).

The often recognized limitation of remedies to those available under a comprehensive administrative statute is based on the same policies which underlie the grant of absolute immunity to federal officials. This Court observed in *Bush:*

> "The costs associated with the review of disciplinary decisions are already significant — not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions. . . . [I]t is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct . . . , they would be deterred from imposing discipline in future cases."

462 U.S. at 388-89. Cf. *Butz,* 438 U.S. at 515-516 quoted at Note 12, *supra.*

Moreover, the administrative procedures provided by the Medicare Act and accorded Dr. Kwoun fully meet the requirements of due process. Petitioners' contention that Dr.

Kwoun was constitutionally entitled to and denied a "full pre-termination hearing" ignores the doctor's appearance before the HCFA administrator and his further submission of written comments and, in any event, misconceives the law.

It is firmly established that due process does not require that a health care provider receive a full hearing prior to suspension or termination from the Medicare program. *See Koerpel v. Heckler,* 797 F.2d 858 (10th Cir. 1986); *Ritter v. Cohen,* 797 F.2d 119 (3d Cir. 1986); *Geriatrics, Inc. v. Harris,* 640 F.2d 262 (10th Cir.), *cert. denied,* 454 U.S. 832 (1981); *Northlake Community Hospital v. United States,* 654 F.2d 1234, 1241-43 (7th Cir. 1981); *Town Court Nursing Center, Inc. v. Beal,* 586 F.2d 266, 276-78 (3d Cir. en banc 1978). Under these authorities, the pre-termination process need not be elaborate but should include "oral or written notice" and an "opportunity to present his side of the story." *Koerpel,* 797 F.2d at 868. Due process is satisfied when the pre-suspension opportunity to be heard provides an "initial check against mistaken decisions" and a full post-termination hearing is given. *Id.*

Reaching this conclusion under the due process analysis set forth in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the Circuits have focused on the essential purpose of the Medicare program — the provision of quality and necessary health care to the elderly and disabled. Because of the need to insure that the intended beneficiaries of Medicare are receiving quality treatment without abuse of federal resources, the Circuits have found the government's interest in the expeditious suspension of doctors from the Medicare program is substantial. These courts have also determined that under the statutory review procedures, the likelihood of an erroneous termination from Medicare going uncorrected is not substantial. *See, e.g., Koerpel,* 797 F.2d at 864; *Northlake,* 654 F.2d at 1242 & 1244-45.

Moreover, the courts have found the physician's interest in a full pre-suspension hearing not of constitutional significance. A suspended physician "may seek private patients" and "may

continue to treat [Medicare] patients and, if he prevails in his appeal, will be eligible for reimbursement." *Ritter,* 797 F.2d at 123.[13] Indeed, as Justice Powell observed in *Arnett v. Kennedy,* 416 U.S. 134, 169 (1974) (concurring op.), an individual's interest in receiving a pre-termination hearing is not constitutionally significant where (as here) he "would be reinstated and awarded backpay if he prevails" in the post-termination hearing.

Dr. Kwoun quite clearly received notice of the charges and the opportunity — which he vigorously exercised — to "present his side of the story" prior to the HCFA suspension decision. *Koerpel v. Heckler,* 797 F.2d at 868. He received a full post-suspension review and through review obtained reinstatement in the Medicare program and backpay — in the form of reimbursement for Medicare services rendered. *Arnett,* 416 U.S. at 169; *Franks,* 796 F.2d at 1240. In short, Dr. Kwoun received precisely the review and remedies which the Medicare Act and due process contemplate.

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[13] While termination or suspension from the Medicare program may have a significant financial impact on a health care provider, a provider is "*not* the intended beneficiary of the Medicare program" and his "financial need to be subsidized for care of [his] Medicare patients is only 'incidental to the purpose and design of the Medicare program.' " *Northlake Community Hospital,* 654 F.2d at 1242 (emphasis original).

CONCLUSION

For the reasons set forth above, the application of absolute immunity to the SEMO PSRO Respondents derives from a straight-forward application of this Court's decision in *Butz v. Economou, supra,* to the facts of this case. Fully satisfying the *Butz* standards — (1) The PSRO functioned here in a prosecutorial capacity; (2) This prosecutorial decision-making is likely (as this suit well illustrates) to result in recriminatory lawsuits; and (3) The Medicare Act provides elaborate administrative safeguards to control any unconstitutional conduct. The Writ should be denied.

Respectfully submitted,

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Dated: July 2, 1987

ADDENDUM

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2. Larry Baker
3. Michael K. Blank, M.D.
4. Joseph Blanton
5. William V. Booth, M.D.
6. Edwin K. Burford, M.D.
7. Jean A. Chapman, M.D.
8. David Clark, M.D.
9. R.F. Dettmer, M.D.
10. D.E. Edwards, M.D.
11. Gordon Eller, M.D.
12. Bettie Sue Fikki
13. Jose H. Gonzales, M.D.
14. Terry Guiley, D.O.,
15. Tom Henderson, M.D.
16. W.E. Hendrickson, M.D.
17. T.O. Honaas, M.D.
18. Robert C. Hoye, M.D.
19. Randall Huss, M.D.
20. W.W. Hutton, D.O.
21. Christopher Jung, M.D.
22. Earle Kennedy, D.O.
23. Robert M. Kepner
24. G.H. Ladyman, M.D.
25. John K. Legan, M.D.
26. Gene Leroux, M.D.
27. R.E. Marts, D.O.
28. A.G. Miranda, D.O.
29. George McAnelly, , M.D.
30. Charles P. McGinty, M.D.
31. Jesse Page, M.D.
32. Pin Pu, M.D.

33. Vinai Radsakulthai, M.D.
34. Martha Reed, M.D.
35. Raymond A. Ritter, M.D.
36. Robert Robbins, D.O.
37. Eugene Ruff, M.D.
38. A.N. Sandler, D.O.
39. Allen Spitler, M.D.
40. Clifford Talbert, M.D.
41. Ben Till, M.D.
42. Austin Tinsley, M.D.
43. A.T. Tuma, M.D.
44. Kirby Turner, M.D.
45. Barry B. White, M.D.

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CLERK

No. 86-1944

In the Supreme Court of the United States

OCTOBER TERM, 1987

SOUNG O. KWOUN, ET AL., PETITIONERS

v.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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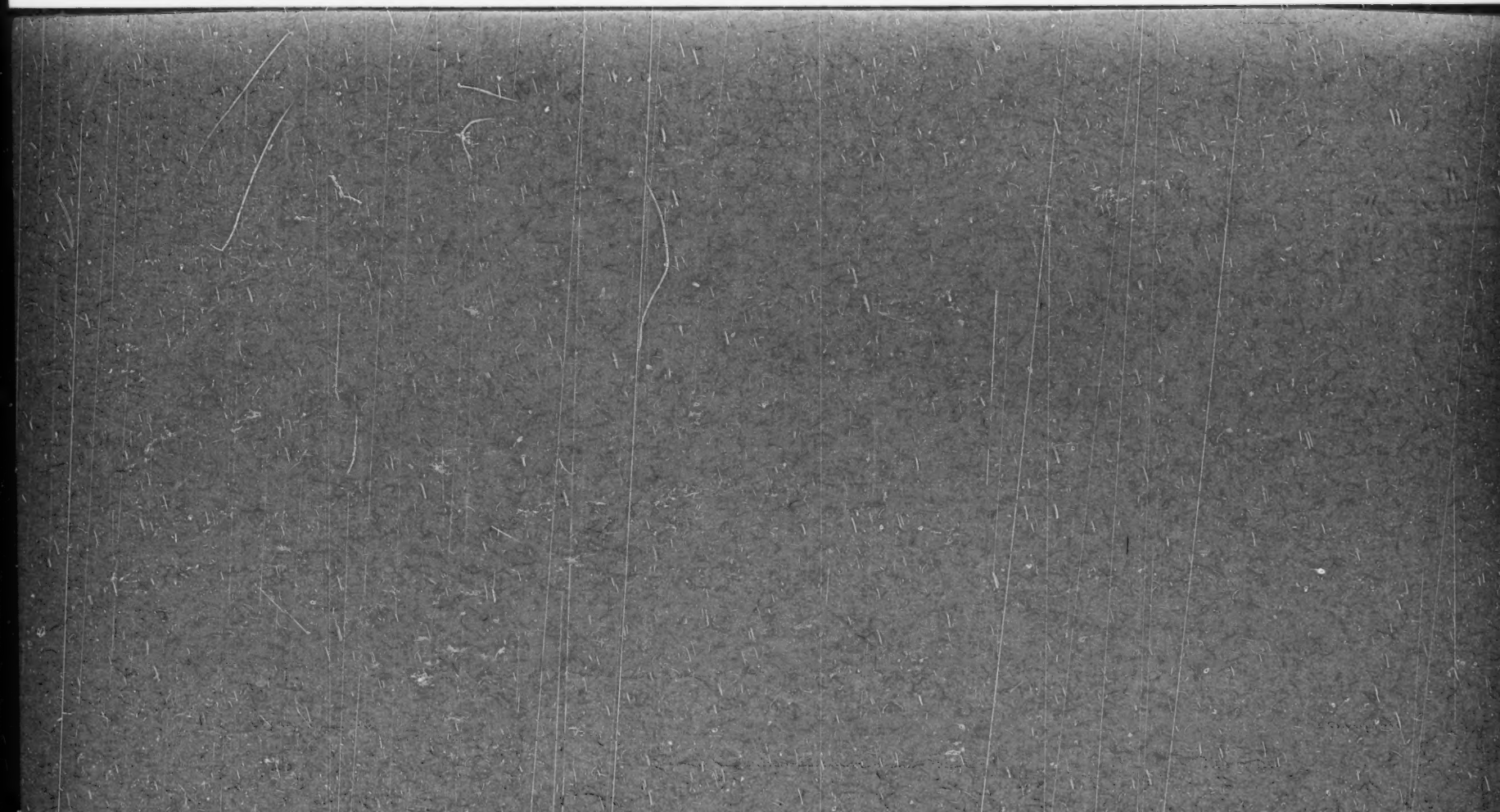

QUESTION PRESENTED

Whether the HHS employees who initiate and pursue an administrative action to exclude a physician from Medicare reimbursement based on the recommendation of a peer review committee are entitled to absolute immunity from damage suits when it is alleged that they committed procedural and substantive errors in violation of the physician's constitutional rights.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 811 F.2d 401. The opinions of the district court (Pet. App. 76a-123a, 124a-139a) are reported at 622 F. Supp. 520 and 632 F. Supp. 1091. The decision of the district court denying plaintiffs' motion to alter or amend the judgment (Pet. App. 140a-143a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 145a-146a) was entered February 4, 1987. A petition for rehearing was denied on March 9, 1987 (Pet. App. 147a-148a). The petition for a writ of certiorari was filed on June 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the Medicare Act, the Secretary of Health and Human Services (HHS) is authorized to exclude a physician from participation in the Medicare program (meaning that no Medicare reimbursement may be made with respect to services furnished by the physician) upon recommendation by a committee of peer review physicians. The physician may then obtain de novo review before an administrative law judge. In this case, the administrative law judge reversed the initial administrative decision to exclude a physician. The physician then brought this suit, seeking damages from the peer review physicians who recommended exclusion and testified before the administrative law judge, as well as against the HHS employees who processed the recommendation, made the decision to exclude him, and defended that decision before the administrative law judge. The district court dismissed the complaint, and the court of appeals affirmed, holding that the defendants were entitled to absolute immunity.

1. The Medicare Act provides that HHS may not reimburse a physician who has furnished services which the Secretary determines were "substantially in excess of the needs of individuals" or "of a quality which fails to meet professionally recognized standards of health care." 42 U.S. 1395y(d)(1)(C). The Secretary may exclude from eligibility for future Medicare reimbursement a physician who has failed "in a substantial number of cases[,] substantially to comply" with his obligation to provide medically necessary care meeting professionally recognized standards, or who has "grossly and flagrantly" violated this obligation in one or more instances. 42 U.S.C. 1320c-5(b)(1).

In 1972, Congress established peer review committees of private physicians, called professional standards review organizations (PSROs), to help the Secretary review physicians' performance under Medicare and Medicaid. 42

U.S.C. (Supp. IV 1974) 1320c *et seq.*[1] Each PSRO was charged with the responsibility of determining whether services provided under Medicare or Medicaid were "medically necessary" and met "professionally recognized standards of health care." 42 U.S.C. (Supp. IV 1974) 1320c-4(a)(1). The PSROs were to make recommendations to the Secretary as to whether particular physicians should be excluded from Medicare eligibility. 42 U.S.C. (Supp. IV 1974) 1320c-6.

Under the procedures followed in this case, HHS could not exclude a physician without first giving notice of intent to exclude, in response to which the physician could submit documentary evidence and written argument, and request an informal hearing. 42 C.F.R. 420.102(a) (1980).[2] If HHS decides to exclude, the physician may appeal to an administrative law judge, where he has a right to a formal hearing with cross-examination and a requirement for a decision by the judge based upon the evidence of record. 42 U.S.C. 1395y(d)(3); 42 C.F.R. 405.1502(e), 405.1530, 405.1533 *et seq.*, 405.1547, 405.1557. If the decision of the administrative law judge is adverse, the physician may appeal to the Secretary's Appeal Council. 42 C.F.R. 405.1561 *et seq.* If this appeal fails, the physician may obtain judicial review in a federal district court. 42 U.S.C. 405(g), 1395y(d)(3).

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[1] We cite the statute as in effect when the facts of this case occurred (in 1979-1981). In 1982, the provisions of the Act regarding peer review were extensively amended. Pub. L. No. 97-248, § 143, 96 Stat. 382. As relevant here, these amendments are discussed at page 14, *infra*. Under the 1982 amendments, the peer review committees are now called "peer review organizations" or "PROs."

[2] We cite the regulations in effect when the facts of this case occurred; the present regulations governing exclusion of physicians based on peer review findings of substandard practice appear at 42 C.F.R. Pt. 1004. New Medicare exclusion procedures are discussed at pages 14-15 & n.12, *infra*.

2. This case started when the Health Care Financing Administration (HCFA), the HHS office which administers this program, told the Southeast Missouri PSRO that its area led the nation in hospital discharge rates per 1000 Medicare enrollees. III App. 365.[3] The resulting investigation focused on the Poplar Bluff Hospital, which had the highest patient readmission rate of the 21 hospitals in the Southeast Missouri area. *Ibid.*; I App. 117. The PSRO performed a detailed study of patient records at Poplar Bluff, selecting the records of patients with six or more admissions plus a random selection of surgical cases. I App. 117. Six physicians reviewed the records of 20 patients, totalling 135 records. *Ibid.* These patients averaged eight admissions for the six-month period covered by the study. *Ibid.*

Following this study, the PSRO sent Poplar Bluff Hospital a "Notice of Potential Violation," summarizing its findings and stating that the Hospital and staff physicians could be excluded from Medicare participation. I App. 118. A meeting was then held with the Poplar Bluff staff (which included Dr. Kwoun); at this meeting a list of violations was handed out, and under each violation a list of medical records identified by number, date of admission and doctor's initials. I App. 136-140; III App. 366. The most frequently appearing initials were "SOK," identifying Dr. Kwoun. I App. 143-148. The hospital administrator and staff were invited to compare the material presented with their records and discuss the matter. III App. 367.

This meeting took place October 29, 1979. III App. 366. At the meeting, it was also announced that the hospital would be placed on "non-delegated status," meaning that no surgery could be done on federally-funded patients

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[3] "App." refers to the appendix in the court of appeals. The hospital discharge rate is a way of measuring how frequently Medicare enrollees are being hospitalized.

unless an outside physician designated by the PSRO approved it. *Ibid.* During the succeeding weeks, considerable friction developed between Dr. Kwoun and the PSRO physicians responsible for approving surgery; Dr. Kwoun felt that the PSRO physicians were denying approval for surgery that should be done, while the PSRO felt that Dr. Kwoun was proposing unnecessary surgery and failing to comply with the procedures for PSRO review. III App. 368-371. On January 22, 1980, nearly three months after the initial meeting with the Hospital staff, the PSRO voted to recommend sanctions against Dr. Kwoun. I App. 166. The vote was 16 to 1, with one abstention. I App. 125.

The PSRO report recommending sanctions was sent to the Kansas City Regional Office of HCFA. III App. 375. The Regional Office concurred in the recommendation and sent it to the Bureau of Quality Control at HCFA Headquarters in Baltimore. III App. 376-377. The HCFA Bureau of Quality Control then sent Dr. Kwoun a notice formally proposing to exclude him from Medicare eligibility. I App. 171. Dr. Kwoun, through counsel, responded to the proposed exclusion, charging that the evidence did not support the PSRO findings and that Dr. Kwoun was the subject of discrimination, and requesting a hearing. I App. 178-181.

An informal hearing was then held before the Director of HCFA's Bureau of Quality Control. At this hearing, and in a subsequent written submission, Dr. Kwoun's counsel presented a detailed, case-by-case critique of the PSRO recommendation. II App. 311-315. The HCFA Bureau of Quality Control then concluded that "there is merit" in Dr. Kwoun's arguments and returned the file to the PSRO with instructions to respond specifically to the points Dr. Kwoun had made. III App. 383-384. In response, the PSRO reviewed the records again, adhered to its previous recommendation, and sent the records back to HCFA in Baltimore with the comments of the peer

reviewers attached. III App. 385. HCFA forwarded this material to Dr. Kwoun's counsel, who filed a lengthy and vigorous response, including a case-by-case discussion of the patient records at issue. II App. 322-330; III App. 386-387.

HCFA then issued its decision, excluding Dr. Kwoun from Medicare eligibility for a period of 10 years. The decision made the following finding (II App. 336):

> Specifically, the evidence substantiates instances of unnecessary or inappropriate use of pacemakers, improper use of laboratory services, inappropriate drug usage, unnecessary hospital admissions, scheduling unnecessary surgery, excessive use of ancillary services based upon diagnosis and treatment rendered, and services rendered which were not consistent with the diagnosis. * * * * * [T]he evidence submitted by Dr. Kwoun in support of his claims of racial discrimination and personal antagonism was uncorroborated hearsay only. In light of this and of the compelling record evidence of his poor medical performance, we find his claims unsubstantiated and without merit.

Dr. Kwoun then exercised his right to a formal hearing before an administrative law judge. After the hearing, the judge reversed Dr. Kwoun's exclusion and ordered his reinstatement. In a 183-page opinion, the judge held that HCFA had committed procedural and substantive errors. III App. 348 *et seq.* The ALJ found two procedural errors. First, he found that Frank Kram, an employee in the HCFA Regional Office (and a defendant in this suit) had talked about the case twice with members of the PSRO. This, the ALJ held, violated HCFA procedures, which he interpreted to require that HCFA's action on the PSRO recommendation be based solely on the PSRO's written report. III App. 397, 402, 406-407. Second, the ALJ found that Dr. Kwoun and his counsel had not received adequate notice of the charges against him, since the

various oral and written notices they received were not sufficiently specific. III App. 399-400, 403-406, 407-408, 410-411.[4]

The ALJ went on to criticize the presentation of the case against Dr. Kwoun, saying that the testimony of one witness was a "complete fabrication" (III App. 511), that the PSRO and HCFA had engaged in "aberrational review" (*ibid.*), that the government witnesses should have acknowledged "the outdated equipment [Dr. Kwoun] had at his disposal" as well as "his rural community, the lack of cardiologists and other thoracic surgeons * * * at the same time criticizing perceived lack of consultation or referrals. This is strong evidence of stratagem" (III App. 511-512).[5]

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[4] On the substance of the case, the ALJ concluded (III App. 506):

> The Government has not proven by credible evidence that [Dr. Kwoun] provided services substantially in excess of the needs of the individual in any of the cases * * *. Furthermore, even though there may be a few isolated cases where there was some evidence that services were of doubtful necessity, the Government has not established that there was a pattern of services being consistently rendered which were substantially in excess of the needs of individuals. The evidence also fails to prove that the services rendered were of a quality which failed to meet professionally recognized standards of health care.

[5] The judge also criticized the HCFA employees involved in the case (III App. 513):

> The reviewers disregarded the facts in the patients' records, the practical, and physical situation under which the respondent practiced. They disregarded positive proof favorable to the respondent and made inferences unfavorable to the respondent in all cases where favorable inferences could or should have been drawn. The respondent at every opportunity called these failures to the attention of the Health Care Financing Administration. The prosecution witnesses didn't back off but changed their criticisms still disregarding the facts of the patient's case. This stubbornness on behalf of professional people is despicable and certainly not worthy of being condoned by the Health Care Financing Administration.

3. This suit followed. Four HCFA officials were named: respondents Frank Kram, Katherine Rosenfeld, Don Nicholson, and Ralph Howard. Kram and Rosenfeld were employees in the Kansas City Regional Office. Kram initially received the PSRO report and discussed it with members of the PSRO; Rosenfeld, his supervisor, signed the letter to HCFA in Baltimore concurring in the PSRO recommendation. III App. 375-376. Nicholson is a HCFA employee in Baltimore; he signed the notice of proposed exclusion sent to Dr. Kwoun. III App. 377-378. Howard is a HCFA official in Baltimore; he signed the final decision excluding Dr. Kwoun from Medicare eligibility. III App. 387-388.

Three counts of the complaint named the HCFA employees. Count IV alleged that these defendants denied Dr. Kwoun fair access to the HCFA procedures, as well as his right to practice medicine and to participate in the Medicare program with his reputation intact. This conduct, the complaint alleged, violated the Fifth Amendment. VII App. 894. Count V charged that the federal respondents "commenced a prosecution against plaintiff Kwoun and caused that prosecution to be continued without probable cause" (*ibid.*). Count VI charged that "defendants' conduct in commencing a prosecution against plaintiff Kwoun and causing that prosecution to be continued under the present circumstances and without probable cause for same, constitutes extreme and outrageous conduct" (*ibid.*). The factual allegations of the complaint charged that the HCFA officials were aware that the peer review committee gave Dr. Kwoun inadequate notice and issued an inaccurate report. The complaint also charged that the HCFA officials processed the peer review recommendation without following agency policies, published a newspaper notice of the proceeding, and in presenting HCFA's case before the administrative

law judge misstated the facts, overlooked evidence favorable to Dr. Kwoun, and fabricated evidence. VII App. 891.

4. The district court declined to dismiss the case against the federal respondents on the basis of absolute immunity, on the ground that "reasonable minds could differ as to whether [the officials'] activity is within [their] scope of authority" (Pet. App. 100a). All federal respondents (but one) immediately appealed that decision.[6] While that appeal was pending, the district court dismissed the complaint as to all defendants, on the ground that they were entitled to qualified immunity (Pet. App. 124a-139a). Petitioners' appeal from that decision was consolidated with the prior appeal.

5. The court of appeals, by a divided vote, affirmed the district court's order dismissing the complaint, on the ground that respondents were entitled to absolute immunity (Pet. App. 1a-42a). The court of appeals held that the HCFA employees had absolute immunity from petitioners' common-law tort claims under *Barr* v. *Matteo*, 360 U.S. 564 (1959), because their actions, even if mistaken, were within the scope of their authority (Pet. App. 8a-14a). The court also held that these employees were entitled to absolute immunity against the claims for constitutional violations, on the ground that their conduct occurred "in the context of essentially advocatory prosecutorial duties—'deciding whether a proceeding should be brought and what sanctions should be sought,' *Butz* [v. *Economou*, 438 U.S. 478, 515 (1978)], against 'a specific target,' *Gray* v. *Bell*, 712 F.2d 490, 501 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)" (Pet. App. 19a). The court of appeals also extended absolute immunity to the peer review physicians. The court concluded that peer review groups are analogous to the professional organiza-

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[6] One HCFA defendant, Katherine Rosenfeld, did not appeal.

tions to whom absolute immunity from constitutional claims has been granted when disciplinary actions have resulted in a lawsuit by the person disciplined. Pet. App. 27a-28a.

The dissent argued that the record did not contain sufficient evidence to support the conclusion that the HCFA defendants were performing prosecutorial or adjudicatory functions and were therefore entitled to absolute immunity. The dissent believed that the case should have been remanded for additional findings on this issue. Pet. App. 43a-47a, 54a-55a. The dissent also concluded that the Medicare statute required that the physicians acting as the peer review group receive only qualified immunity. *Id.* at 47a-54a (citing 42 U.S.C. (Supp. I 1977) 1320c-16(b)(1)) (correct citation).

ARGUMENT

The decision below is correct as to the federal respondents,[7] and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The decision below is correct as to the respondent HCFA officials.[8] Those officials performed the tradi-

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[7] This brief is filed on behalf of the HCFA officials only; we do not address the issues relating to the peer review physicians, other than to note certain changes in the peer review procedures that have occurred since the case arose. See pages 14-15, *infra.*

[8] That decision does not conflict with any decision of this Court or of any other court of appeals. None of the decisions cited by petitioner is similar to this case. See *Harper* v. *Jeffries,* 808 F.2d 281 (3d Cir. 1986) (probation officers); *Tripati* v. *INS,* 784 F.2d 345 (10th Cir. 1986) (United States Attorney, immigration officer, and probation officers all found to have absolute or qualified immunity); *Cameron* v. *IRS,* 773 F.2d 126 (7th Cir. 1985) (tax protestor suit challenging IRS agents' processing of protestor's files); *Windsor* v. *The Tennessean,* 719 F.2d 155 (6th Cir. 1983) (wrongful discharge suit brought by prosecutor against United States Attorney), cert. denied, 469 U.S. 826 (1984); *Bothke* v. *Fluor Engineers & Constructors, Inc.,* 713 F.2d 1405 (9th Cir. 1983) (wrongful levy action against IRS official).

tional prosecutorial function of deciding, under highly discretionary statutory criteria, whether to adopt a recommendation to impose sanctions on a physician, and if so, whether to defend that decision before an administrative law judge. In view of those functions, they were entitled to absolute immunity.

In *Butz* v. *Economou,* 438 U.S. 478 (1978), this Court ruled that administrative officials performing functions analogous to those of prosecutors are entitled to absolute immunity from damages based on charges of constitutional violations when the officials act within the scope of their authority. The Court explained that "[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.* at 515. In particular, the Court emphasized that "[a]n agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." *Ibid.*

The "broad discretion" which this Court saw as characteristic of the prosecutor's role is also evident here. HCFA's decision to proceed aganist Dr. Kwoun was governed by broad statutory criteria: whether Dr. Kwoun had furnished medical services that were "substantially in excess of the needs of individuals" or of a "quality which fails to meet professionally recognized standards of health care," and whether Dr. Kwoun failed "in a substantial number of cases[,] substantially" to comply with his obligations or had "grossly and flagrantly" violated his obligations in one or more cases. 42 U.S.C. 1395y(d)(1)(C); 42 U.S.C. 1320c-5(b)(1). Decisions under this type of broad standard are peculiarly susceptible to second-guessing and, in the context of discipline directed against a professional person, are almost guaranteed to elicit a damages action in the absence of absolute immunity.

The conclusion that HCFA officials making these determinations have absolute immunity is consistent with the court of appeals' decisions following *Butz* that have distinguished between prosecutorial and investigative decisions, holding that the latter are subject to only a qualified immunity. *Norton* v. *Liddel,* 620 F.2d 1375, 1379 (10th Cir. 1980) (prosecutor absolutely immune for filing charges); *Henzel* v. *Gerstein,* 608 F.2d 654, 657 (5th Cir. 1979) (same); see *Ray* v. *Pickett,* 734 F.2d 370 (8th Cir. 1984); *Gray* v. *Bell,* 712 F.2d 490 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Forsyth* v. *Kleindienst,* 599 F.2d 1203, 1213-1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981). Here, the respondent HCFA officials became involved in the case only after the peer review committee had focused on Dr. Kwoun.[9] At that point, the HCFA officials' only role was to determine whether the facts developed by the peer review committee warranted initiation of a proceeding against Dr. Kwoun. That was a quintessentially prosecutorial determination.[10]

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[9] On December 17, 1979, the chairman of the peer review committee advised Dr. Kwoun in writing that his current actions "are being added item by item to your file on sanctions which is developing and will in due time be reviewed by the PSRO Board and other appropriate agencies for action." I App. 118; III App. 370-371. The allegedly improper meetings between a HCFA official and the peer review physicians—which were the earliest acts by HCFA officials alleged to violate Dr. Kwoun's rights—occurred in January and March, 1980. III App. 377, 406. In *Gray* v. *Bell, supra,* the court listed "important clues" for determining whether pre-indictment conduct is entitled to absolute immunity, one of which is the extent to which an official has focused on a specific target. 712 F.2d at 501. The December 17 letter focused on Dr. Kwoun. At that point, further proceedings became prosecutive rather than investigative.

[10] There is no merit to the contention made in the dissent that the case should have been remanded for further factual development concerning the roles played by the HCFA defendants. Pet. App. 45a-46a, 54a-55a. The case was decided on the basis of an extensive record, including a voluminous opinion by the administrative law judge which

Petitioners' claim that the members of the peer review committee were motivated by racial animus, even if correct, would not affect the immunity of the HCFA officials. The three counts in petitioners' complaint alleging racial discrimination do not name the HCFA defendants. VII App. 893-894 (Counts I-III). In addition, the only evidence of racial animus is a remark made at a social occasion by one of the 18 members of the peer review committee who voted on the recommendation. II App. 305-306. There was no allegation, and no evidence, that this racial animus was shared by any of the federal officials who were involved in this case.[11] Petitioners have cited no case, and we know of none, that would support the contention that a prosecutor's immunity from damages liability is overcome by evidence that an individual who recommended in favor of prosecution may have been racially motivated.

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describes in great detail the actions performed by the defendant HCFA officials. III App. 376-388. This description shows that respondent Frank Kram made the initial recommendation for HCFA to proceed; respondent Katherine Rosenfeld wrote a letter recommending this course to her superiors; respondent Don Nicholson issued the notice of proposed exclusion, participated in the informal hearing that ensued and in the remand of the case to the peer review committee; and respondent Ralph Howard issued the final notice of exclusion which was appealed to the administrative law judge. *Ibid.* In addition, respondent Kram appeared at the hearing before the administrative law judge and was one of HCFA's witnesses. III App. 348. Petitioners never contested these facts, or contended that additional facts existed to show that the HCFA defendants performed additional functions beyond those described. The court of appeals' conclusion that these functions were prosecutorial in nature is therefore amply supported by the record.

[11] The record does not support the statement made by the dissent below that Dr. Kwoun may have been singled out because he was "apparently the only minority doctor in the hospital" (Pet. App. 47a n.1). The record lists six staff doctors who attended the initial meeting with the peer review committee; the names listed suggest that at least four

2. In any event, recent modifications in the Medicare program substantially lessen the prospective importance of the issues petitioners seek to raise. In this case, the peer reviewers followed an informal, consultative procedure. Dr. Kwoun was not represented by counsel at the peer review stage, and he had no opportunity to meet with the committee as a body, to present witnesses before the committee or to question its members. In 1982, however, Congress amended the Medicare statute to provide that the peer review committee's recommendation will automatically go into effect unless the recommendation is altered or reversed by the Secretary within 120 days. Pub. L. No. 97-248, § 143, 96 Stat. 388 (codified at 42 U.S.C. 1320c-5(b)(1)). Moreover, in May 1987, HCFA amended its Peer Review Organization (PRO) Manual to require a PRO, before recommending sanctions, to meet with a physician, and also to require that the meeting comply with various safeguards designed to provide additional procedural protections for physicians.[12] Thus, under the procedures now in effect, PROs will render a legally binding decision, rather than merely offer a recommendation, and they must follow a prescribed process affording considerable procedural protections.

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of these physicians could have been members of minority groups (Drs. Kwoun, Varma, Tuma, and Kim). I App. 143. Nine problem cases were discussed at this meeting; Dr. Kwoun was the physician in five of these cases. I App. 144. It might be noted that the 18 peer review physicians who attended the meeting at which sanctions against Dr. Kwoun were recommended (all of whom are defendants in this suit) included Dr. Jose Gonzales, Dr. Pin Pu, Dr. Vinai Raksakulthai, and Dr. A.T. Tuma. I App. 165; VII App. 887-888. Sixteen doctors at the meeting voted for the recommendation. I App. 169.

[12] The meeting must satisfy the following requirements (Health Care Financing Administration, Dep't of HHS, *Peer Review Organization Manual, Transmittal No. 15,* at 6-12 to 6-12.3 (May 1987) (amending Section 6025):

1. Notice prior to the meeting, "including a clear statement of the factual bases for [the PRO's initial] findings, the purpose

These revisions show that the decision below is largely of historical, and not current, significance. The current procedures clearly provide the type of safeguards that the Court has held justify absolute immunity for actions taken within the scope of an official's duties. See *Cleavinger* v. *Saxner,* No. 84-732 (Dec. 10, 1985), slip op. 9; *Butz* v. *Economou, supra.*[13] In this case, unlike *Cleavinger,* some

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of the proposed meeting, the potential sanctions which may be imposed * * *, and the procedures applicable to the meeting."

2. The right to present expert testimony in either oral or written form.
3. Representation by an attorney at the meeting, who may assist the physician in the presentation of witnesses, ask questions of the peer reviewers designed to clarify their conclusions, ask for clarification of the peer reviewers' questions to witnesses and the physician, and present opening and closing statements.
4. Preparation of a verbatim transcript of the meeting, for the use of the physician and his counsel in their submission to HCFA in connection with its review of the peer review recommendation.
5. Disqualification from the final PRO vote of the peer review physician primarily responsible for developing the record and the PRO's initial findings.

We have provided a copy of this transmittal to petitioners' counsel and have also lodged a copy of it with the Clerk.

[13] In determining not to grant absolute immunity to members of a prison disciplinary committee, *Cleavinger* cited (slip op. 13) the absence of four procedural protections at disciplinary hearings: the right to counsel, the right to question witnesses, the right to receive a transcript of the hearing, and the right to have independent committee members make the final decision. These elements may be less important in the context of a proceeding like the one involved in this case, which will typically hinge on medical subjects that are best resolved by a dialogue among physicians, rather than on issues of credibility that require cross-examination. See *Ritter* v. *Cohen,* 797 F.2d 119 (3d Cir. 1986). *Ritter* held that due process does not require the state to conduct an evidentiary hearing before terminating a physician's eligibility

of these elements were available at the pre-suspension informal hearing held by HCFA, and all of them were available at the post-suspension hearing before the administrative law judge. The new procedures, which will be available in the first instance, not only strengthen the case for absolute immunity for PRO officials, but also make clear that a decision in this case will not govern cases arising in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987

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for Medicaid where the doctor was able to meet informally with the peer reviewers. As the Third Circuit explained, "[i]ssues such as the medical necessity of particular treatments, or the adequacy of a physician's records, are not determined to any great extent on credibility grounds. * * * Ritter had an opportunity to meet with the peer review team, and, most important, to submit written reasons why he should not be terminated from the program. Presentation of his case would not be significantly abetted by an evidentiary hearing." *Id.* at 123. In any event, the current procedures offer additional safeguards.

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No. 86-1944

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUNG O. KWOUN, *et al.*,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,

Respondents.

OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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No. 86-1944

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SOUNG O. KWOUN, et al.,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY MEMORANDUM FOR PETITIONERS

This Reply Memorandum will address primarily the contentions raised by the United States in its Brief in Opposition, particularly as they relate to the position of the government taken in No. 86-1145, Patrick v. Burget. We will also address briefly the arguments made in the

Brief in Opposition of the other respondents.

I.

The Response of the United States

We urge that certiorari should be granted in this case along with certiorari in Patrick v. Burget and that the cases be set down for oral argument together. There is a common question underlying both cases: i.e., whether and to what extent private individuals who are members of peer review organizations established under either federal law, as here, or state law, as in Patrick, should be granted immunity from liability under federal civil rights or anti-trust statutes because they have been given functions related to the enforcement of federal or state law.

The government urges that certiorari should be granted in Patrick to decide

whether the "state action" doctrine immunizes peer review organizations' members from anti-trust liability because the actions they have taken are done under the auspices of state law.[1] Thus, review is urged to decide whether "a state may . . . give immunity to private parties" in a case involving "an attempt by private parties, not governmental units, to achieve immunity from Sherman Act liability."[2] In the present case, the question is whether the same persons, viz., private physician members of peer review organizations, should be given absolute immunity from liability under federal civil rights statutes because

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[1] Compare Tambone v. Memorial Hospital for McHenry County, Inc., ___ F.2d ___, 56 U.S. Law Week 2129 (7th Cir., July 14, 1987), with Marrese v. Interqual Inc., 784 F.2d 373 (7th Cir. 1984).

[2] Brief for the United States As Amicus Curiae in No. 86-1145, pp. 7-8.

they have been given a role under federal law in determining whether persons should be excluded from Medicaid reimbursement programs.

In its Brief in Opposition in the present case the federal defendants decline to address this issue for reasons that are not clear.[3] They argue essentially that the question presented here will not recur because of changes in the statute and regulations that provide more procedural protections during the peer review process; but this argument is inaccurate and irrelevant. The claim here is that the actions of the members of the peer review organization were motivated by racial bias towards the petitioner, and that the federal

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[3] As we noted in the petition for a writ of certiorari, at oral argument in the court of appeals the United States took the position that the PRO members should only have qualified immunity.

defendants failed to ensure that the peer review defendants had provided petitioner with due process of law in making their recommendation. The fact that such actions are now subject to certain procedures will not in any way whatsoever lessen the possibility that the motives for initiating the actions were illegal under the civil rights statutes. Moreover, the notice and opportunity to be heard provisions of the regulations existing at the time were ignored.

Thus, the basic question of the extent to which courts should extend immunity to private persons who serve a role in an administrative procedure is still raised by the present case. It is an issue that has not been decided by this Court[4] and, we submit, is an

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[4] This Court's only ruling to date was to summarily affirm without opinion a lower court's holding that the medical

important and recurring one that has lead, as demonstrated by our petition for a writ of certiorari, to substantial confusion in the lower courts.[5] In addition, the question of the limitations of Butz v. Economou, 438 U.S. 478 (1978) as it relates to the federal defendants is not changed by the promulgation of new regulations. Thus, this case does not involve a "straight-forward application" of Butz, as the SEMP PSRO respondents suggest.

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peer review statute was not unconstitutional on its face. Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill. 1975), aff'd, 423 U.S. 975 (1975).

[5] Cf. Cassim v. Bowen, 824 F.2d 791, 796 (9th Cir. 1987), for a description of the disagreement between the circuits as to the nature of the constitutional right involved in the denial of Medicaid reimbursement.

II.

The Response of the Private Respondents

The bulk of the private respondent's Brief in Opposition attempts to demonstrate that there is no conflict between the circuits. We will not repeat what we have already said in the petition for writ of certiorari but simply wish to reemphasize that there is a clear conflict between the decision of the Eighth Circuit and a number of state court decisions, including decisions of the highest state courts of several states, as to whether peer review organization members should have absolute or qualified immunity. See cases cited in the Petition for A Writ of Certiorari, p. 35, n. 24. This is an independent basis for granting the petition and again illustrates the importance and recurring

nature of the issues presented.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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No. 86-1944

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OCTOBER TERM, 1987

SOUNG O. KWOUN, ET AL., PETITIONERS

v.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1987

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v.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

The purpose of this memorandum is to advise the Court of the enactment on December 22, 1987, after we filed our brief for the federal respondents in opposition, of Section 4095 of the Omnibus Budget Reconciliation Act of 1987 (OBRA), Pub. L. No. 100-203.[1] Although this provision does not affect this case, in our view it significantly diminishes the prospective importance of the question presented in the petition.

Section 4095(a) of the 1987 OBRA amended Section 1156(b) of the Social Security Act, 42 U.S.C. 1320c-5(b), by providing that physicians located in certain areas[2] who

[1] The complete text of Section 4095 is appended. Also appended is the pertinent excerpt from the House Committee Report on the legislation.

[2] This new procedure applies only to providers or practitioners located in certain rural areas or areas with a health manpower shortage. However, HHS has advised us that approximately 75% of all

are excluded from Medicare eligibility are entitled to a hearing before an administrative law judge before the exclusion may take effect. Section 4095(a) goes on to provide that "[i]f the judge does not determine, by a preponderance of the evidence, that the provider or practitioner will pose a serious risk to [Medicare eligible] individuals if permitted to continue furnishing [Medicare-covered] services, the Secretary shall not effect the exclusion * * * until the provider or practitioner has been provided reasonable notice and opportunity for an administrative hearing thereon * * *." In addition, OBRA Section 4095(e) directs the Secretary to report to Congress within one year from its enactment (*i.e.*, by December 22, 1988) about the new peer review procedures recently adopted by HCFA and described in our brief in opposition (at 14-15). The report must (§ 4095(e)):

> set forth such improved procedures, describe the response of physicians and providers to the procedures, assess whether the procedures effect an appropriate balance between procedural fairness and the need for ensuring quality medical care, comment on the alternative provider-patient notification procedure contained in the agreement, and recommend whether such procedures should apply to institutional providers of health care services.

We explained in our brief in opposition (at 14-16) that this case is an inappropriate vehicle to review the question presented in the petition because the exclusion procedures challenged here have been modified by statutory and

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exclusions under 42 U.S.C. 1320c-5 have involved providers in areas that would qualify under the new procedure. To date, 61 exclusions have taken place under 42 U.S.C. 1320c-5, of which 45 (or 73.8%) involved practitioners in rural areas or in areas of health manpower shortage as defined in the new legislation.

administrative developments in the Medicare program occurring after the events of this case. The 1987 OBRA provides an additional reason for awaiting a case involving the new procedures before deciding what Medicare exclusion procedures are necessary in order to safeguard participants from civil damages liability. In cases as to which OBRA Section 4095(a) applies, the justification for affording absolute immunity to participants in the administrative process is overwhelming. In those cases a physician cannot be excluded from the Medicare program until after he has had an opportunity for a quasi-judicial hearing, which clearly provides the type of safeguards the Court has found justify absolute immunity for actions taken within the scope of an official's duties, as we explained in our earlier brief in opposition (at 15). Moreover, in a case arising under the new procedures, the Court will have the benefit of the administrative and congressional review of the new procedures that Section 4095(e) of the 1987 OBRA has set in motion.

For these additional reasons, the question presented in the petition does not warrant review by this Court.

Respectfully submitted.

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Solicitor General

FEBRUARY 1988

APPENDIX A

Section 4095 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987), provides as follows:

> (a) IN GENERAL.—Section 1156(b) of the Social Security Act (42 U.S.C. 1320c-5(b)) is amended by adding at the end the following new paragraph:
>
> (5) Before the Secretary may effect an exclusion under paragraph (2) in the case of a provider or practitioner located in a rural health manpower shortage area (HMSA) or in a county with a population of less than 70,000, the provider or practitioner adversely affected by the determination is entitled to a hearing before an administrative law judge (described in section 205(b)) respecting whether the provider or practitioner should be able to continue furnishing services to individuals entitled to benefits under this Act, pending completion of the administrative review procedure under paragraph (4). If the judge does not determine, by a preponderance of the evidence, that the provider or practitioner will pose a serious risk to such individuals if permitted to continue furnishing such services, the Secretary shall not effect the exclusion under paragraph (2) until the provider or practitioner has been provided reasonable notice and opportunity for an administrative hearing thereon under paragraph (4).
>
> (b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to determinations made by the Secretary of Health and Human Services under section 1156(b) of the Social Security Act on or after the date of the enactment of this Act.

(c) **TRANSITION FOR CURRENT CASES.**—In the case of a practitioner or person—

(1) for whom a notice of determination under section 1156(b) of the Social Security Act has been provided within 365 days before the date of the enactment of this Act,

(2) who has not exhausted the administrative remedies available under section 1156(b)(4) of such Act for review of the determination, and

(3) who requests, within 90 days after the date of the enactment of this Act, a hearing established under this subsection, the Secretary of Health and Human Services shall provide for a hearing described in section 1156(b)(5) of the Social Security Act (as amended by subsection (a) of this section).

(d) **REDETERMINATIONS IN CERTAIN CASES.**—If, in hearing under subsection (c), the judge does not determine, by a preponderance of the evidence, that the provider or practitioner will pose a serious risk to individuals entitled to benefits under title XVIII of the Social Security Act if permitted to continue or resume furnishing such services, the Secretary shall not effect the exclusion (or shall suspend the exclusion, if previously effected) under paragraph (2) of section 1156(b) of such Act until the provider or practitioner has been provided an administrative hearing thereon under paragraph (4) of such section, notwithstanding any failure by the provider or practitioner to request the hearing on a timely basis.

(e) **REPORT ON IMPROVEMENTS IN PROCEDURES FOR IMPOSING SANCTIONS.**—Not later than one year after the date of enactment of this Act, the Secretary of Health and Human Services shall report to Congress on the improved procedures for imposing sanctions

against a practitioner or person under section 1156 of the Social Security Act established through agreement by the Health Care Financing Administration, the American Association of Retired Persons, the American Medical Association, and the Office of the Inspector General in the Department of Health and Human Services. The report shall set forth such improved procedures, describe the response of physicians and providers to the procedures, assess whether the procedures effect an appropriate balance between procedural fairness and the need for ensuring quality medical care, comment on the alternative provider-patient notification procedure contained in the agreement, and recommend whether such procedures should apply to institutional providers of health care services.

APPENDIX B

Excerpt from the Staff of the House Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, 100th Cong., 1st Sess., *CP 100-P, Medicare and Medicaid Health Budget Reconciliation Amendments of 1987* 52-53 (Comm. Print 1987):

> Under current law, a physician or provider who is excluded from Medicare, on the basis of a finding by a PRO that the the [*sic*] physician or provider failed to furnish medical care of acceptable quality, is entitled to administrative and judicial review. This review takes place after the exclusion takes effect. Although this procedure has been upheld by Federal courts against challenges that it violates the Constitution, concerns have still been expressed that it is unfair for the exclusion to take effect prior to an evidentiary hearing. Arguments have also been made that such a procedure is not necessary to assure quality of care. Conversely, concerns have been expressed that providing administrative and judicial review prior to exclusion will result in long delays, during which Medicare patients will be subjected to the risk of receiving substandard care.
>
> The Committee bill would attempt to balance these concerns by providing that, before an exclusion took effect, the provider would be entitled to a decision by an administrative law judge (ALJ) as to whether patients would be at serious risk if the provider were to continue furnishing services during the review process. This is not intended to be a full hearing on the merits of whether the provider should be excluded. Instead, it should focus only on the immediate question of whether the provider's continued participation will pose a serious risk to patients. It is the Commit-

tee's intent that the scheduling and conduct of the hearing be expedited as much as possible, consistent with giving the provider adequate notice and opportunity to prepare for the hearing.

The exclusion would take effect immediately only if the ALJ concluded, on the basis of a preponderance of the evidence, that the provider's continued participation posed a serious risk to patients. If the judge did not make that determination, the exclusion would not take effect until after an administrative hearing on the merits of the exclusion. If the ALJ determined that the provider should be excluded, the exclusion would take effect at that point, even though the provider had an additional right to judicial review. Since the courts have upheld the current procedure as satisfying Constitutional requirements, the Committee believes it is permissible to exclude the provider after an administrative review but prior to judicial review.

The provision would be effective with respect to exclusion determinations made by the Secretary on or after enactment. In addition, it would be applied retroactively to those physicians and providers who received a notice of exclusion within one year prior to enactment, who have not exhausted the administrative remedies available to them under current law, and who request the hearing established under this provision within 90 days of enactment. For this purpose, the failure of a provider to have requested a hearing under current law on a timely basis would not be treated as having exhausted his appeal rights and would not preclude him from receiving this new hearing. If a provider were presently excluded, and the ALJ did not determine that the provider posed a risk to patients during his appeal process, the exclusion

would be suspended pending completion of the administrative hearing on whether he should be excluded.

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